

Michigan's Part 201 Environmental Remediation Program Review: *Final Report and Recommendations*

April 2, 2007

Prepared for

Steven Chester, Director
Michigan Department of Environmental Quality
Lansing, Michigan

Prepared by

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April 2, 2007

Steven E. Chester, Director
Michigan Department of Environmental Quality
P.O. Box 30473
Lansing, MI 48909

Dear Director Chester:

We are pleased to transmit this report on the Part 201 Environmental Remediation Program. It has been our pleasure at Public Sector Consultants Inc. to assist with this project.

During the past six months, we have facilitated numerous meetings of the stakeholder groups and organized multiple conference calls as part of this effort to develop suggestions for improving the Part 201 program. Throughout the process, we have been impressed by the dedication of the department staff, the genuine interest shown by the stakeholder groups, and the willingness of all participants to work together toward a common goal.

Thank you, Director Chester, for the opportunity to assist the department in this process. We sincerely hope that the recommendations offered in this report will enable the department to continually improve protection of the public health and the environment while also pursuing effective partnerships to redevelop and reuse Michigan's blighted land.

Sincerely,

A handwritten signature in cursive script, appearing to read "William R. Rustem".

William R. Rustem
Project Director
President,
Public Sector Consultants Inc.

A handwritten signature in cursive script, appearing to read "Mark Coscarelli".

Mark Coscarelli
Project Manager
Senior Consultant for Great Lakes and Environmental Policy,
Public Sector Consultants Inc.

Executive Summary

OVERVIEW

Michigan's environmental remediation program¹ (Part 201) regulates most sites of environmental contamination in Michigan. Part 201 is currently administered by the Remediation and Redevelopment Division (RRD) of the Michigan Department of Environmental Quality (MDEQ). Part 201 regulation impacts many segments of Michigan's environment and economy: land use, surface water and groundwater use, fishery health, business, banking, development, and real estate.

The current statutory framework for Part 201 was established in 1995. The most fundamental change to the program at that time was a shift from a strict liability standard to a causation-based liability standard. While the 1995 amendments to Part 201 have achieved many successes, including providing liability protection for nonliable parties, there is general agreement among practitioners that the last 11 years have revealed opportunities for further program enhancements.

To that end, MDEQ asked Public Sector Consultants to facilitate a stakeholder-driven process to review the current program and to develop recommendations for the MDEQ's consideration. This review process employed four subgroups composed of members with a diverse range of direct experience with the Part 201 program. The four subgroups were organized by topic:

- Program administration
- Brownfield redevelopment
- Complexity and technical issues
- Liability and Compliance

The four subgroups convened over seven months to discuss the Part 201 program, its enabling legislation, guidance documents, administrative rules, and compliance and enforcement issues, among others. Each subgroup developed a series of recommendations that are consolidated in this report.

The recommendations contained in this report represent the collective effort of the regulated community, lenders, consultants, lawyers, and the MDEQ. The recommendations were consensus-driven and were developed to aid the MDEQ in creating the most efficient and effective possible changes to the Part 201 program.

Key results are summarized below:

¹ Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act (NREPA), 1994 P.A. 451, as amended

KEY RESULTS OF THE PART 201 REVIEW

Administration Subgroup

The Administration Subgroup developed four priority goals related to program administration. Specific recommendations are listed under each goal:

- Encourage positive interaction between stakeholders and the Michigan Department of Environmental Quality (MDEQ)
 - Use the comprehensive checklist developed by the Complexity Subgroup**
 - Allow early scoping meetings**
 - Support quality-control efforts for consistent MDEQ decision making**
- Create incentives for source control
 - Common definition of source and source control**
 - Low-interest (below market rate) loan program**
 - Tax-credit incentives**
- Improve the cost-effectiveness of state cleanup program resources
 - Map the current Part 201 administrative process**
 - Streamline the administration process through a general permit process, a fast track process, and/or exemptions**
 - Offer the option of using a third party professional to assist in technical plan review, at the cost of the party proposing the work**
 - Remove site scoring requirement from statute**
 - Consider a permit-based system**
- Use effective methods and indicators to measure and benchmark progress
 - Continue to measure *agency performance* and report to the public**
 - Create a stakeholder group to develop metrics to evaluate *risk reduction* aspects of the program**

Brownfields Subgroup

The Brownfields Subgroup recommends the following:

- Public Act 381 and Brownfield Tax Credits
 - Eliminating the sunset provision on the approval of work plans for school tax capture in the Brownfield Redevelopment Financing Act**
 - Consider opportunities for expanding or allowing additional activities that would be eligible for brownfield funding, and legislative changes that would both streamline the process and make brownfield sites more attractive for redevelopment.**
 - Continue authorization of Brownfield Tax Credits in any Single Business Tax replacement structure**
- Brownfield Program Coordination

Establish an Office of Brownfield Redevelopment to coordinate and streamline all agency programs to support and facilitate the completion of Michigan's brownfield redevelopment projects

Create a unified brownfield redevelopment preliminary application that could be used by all state agencies and local units of government for brownfield-related program incentives, grants, and loans

■ **Brownfield Work Plans**

Amend enabling legislation to streamline MDEQ approval of Act 381 brownfield work plans

Consider reducing the time frame allowed to review work plans

■ **Funding**

Allow the approval of a work plan for school tax capture to provide two mills of the captured State Education Tax (SET) to be used to support the administration of the state's brownfield programs and MDEQ's brownfield grants/loans

Allow the diversion of a certain percentage of local tax capture to be placed in a local revolving fund, prior to completion of "eligible activities" on a brownfield project, provided that there is no net fiscal impact to school tax capture

Complexity Subgroup

The Complexity Subgroup developed the following recommendations. The MDEQ should:

- Employ a **comprehensive checklist** intended to assist in documenting status, guiding progress, and helping to determine the necessary response activities at sites of environmental contamination
- Allow **mixing zone** where venting groundwater enters a National Pollutant Discharge and Elimination System (NPDES) permitted storm sewer
- Develop and test a **model** to determine acceptable alternative groundwater concentrations for the **GSI-utility corridor** exposure pathway, using generic and limited site-specific parameters
- Develop a policy on **single issue resolution** to clarify when an isolated spill may be remediated without involving the rest of the property in MDEQ review
- Develop a rule under Part 201 to establish a **groundwater surface water interface (GSI) criterion for mercury**.
- Clarify a process to allow **site specific bioaccumulation factors (BAF)** to be used in determining groundwater surface water criterion for mercury
- Reduce the number of Part 201 **land use categories** to two: residential and nonresidential
- **Update the "vapor intrusions to indoor air" assessment techniques** used to make protective assumptions

Liability/Compliance Subgroup

The Liability/Compliance Subgroup recommends the following:

- While retaining the causation-based, joint and several, liability scheme, **replace the BEA with a requirement to complete a due care plan** as the basis for liability protection from historic, legacy contamination
- **Clarify the contribution standard** to allow any party that has incurred remediation costs under Part 201 to proceed against any party who is, or may be liable, under part 201
- **Apply a reporting requirement to section 201(14)**, where the report will be used to define the substantive benchmarks that will constitute diligent pursuit of remediation activities
- **Establish increased MDEQ enforcement mechanisms** including administrative penalties, corporate document request authority, and improved statute of limitations
- **Ensure that land and resource use restrictions** are funded, monitored, and correctly reported to **maximize protection of the public health**, both independently by the MDEQ and in conjunction with the pending Uniform Environmental Covenants Act (UECA) legislation

Introduction

In early 2005, the Remediation and Redevelopment Division (RRD) of the Michigan Department of Environmental Quality (MDEQ) invited a small group of individuals with experience in various aspects of the state cleanup and redevelopment program to provide input as the first phase in a planned discussion group process of seeking broader stakeholder input. The Phase I Discussion Group met bi-monthly between April and November 2005 and developed a list of the characteristics of a successful cleanup and redevelopment program (see Appendix A), as well as a summary of recommendations for the proposed Phase II Discussion Group, including the subgroup framework (see Appendix B). Specifically, the Phase I Discussion Group recommended that a larger group be convened to enhance future program improvement discussions. Four subject matter subgroups were suggested: Administration, Brownfields, Complexity, and Liability/Compliance.

Based on these suggestions, MDEQ invited stakeholders to participate in the four subgroups whose work comprised Phase II activities (see Appendix C). MDEQ selected the stakeholders from a larger group of candidates suggested by the Phase I work group. The MDEQ made its selections in an effort to include a representative cross section of interests and allow for manageable group sizes. These meetings were also open to the public and were announced on the MDEQ website, resulting in additional participation.

Part 201 Review:

Phase II

PROJECT PURPOSE

MDEQ Director Steven Chester initiated the Part 201 Phase II Discussion Group process, on counsel from the Phase I Discussion Group. The goal of Phase II was to seek recommendations from stakeholders about needed changes in Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act (NREPA), 1994 P.A. 451, as amended. Michigan's cleanup and redevelopment program has been operating under the most recent statutory framework since June 1995, and is currently administered by the Remediation and Redevelopment Division (RRD) of the MDEQ. One of the 1995 statutory changes included a shift in the liability scheme from a strict liability standard to a causation-based standard, establishment of due care requirements for nonliable facility owners, and the provision of more flexibility for remedies by offering land use-based closure options. The department recognizes that the cleanup and redevelopment program must continue to evolve in order to be effective in meeting its objectives of protecting public health, safety, welfare, and the environment while concurrently promoting brownfield redevelopment.

The Phase II Discussion Group was tasked to identify opportunities to increase the number of cleanups conducted, increase compliance rates, make the program easier to implement, and assure that the best tools and strategies are available to facilitate brownfield redevelopment. Subgroups were advised to create recommendations for changes covering procedures, policies, statutes, and rules. Recommendations, however, must not compromise the program's ability to protect public health, safety, welfare, and the environment.

STRUCTURE OF DISCUSSION GROUP MEETINGS

Four subgroups were created to address the following program areas:

- Program administration
- Brownfield redevelopment
- Complexity and technical requirements
- Liability and compliance

In order to ensure an objective process, the discussion subgroups were led by facilitators from Public Sector Consultants, a private research firm specializing in public policy, based in Lansing, Michigan. The meetings were open to the public and included time for public comment either before or at the conclusion of the meeting.

Each subgroup met approximately five times. A plenary kickoff meeting occurred on September 25, 2006, and a concluding meeting was conducted on April 12, 2007.

Each group was directed by a facilitator who was responsible for calling meetings, recording the proceedings in a manner that established and maintained momentum in the

discussion, elicited feedback from all participants, and provided feedback to the MDEQ on an ongoing basis about the subgroup's progress.

MDEQ staff participated in each subgroup discussion, and were available as well to help answer questions and explain current program implementation practices and challenges. This was also an opportunity for MDEQ staff to understand various perspectives and program performance expectations from discussion group members.

The final report, prepared by Public Sector Consultants, summarizes the recommendations of the subgroups and presents them to Director Steven Chester.

Issues for Subgroup Consideration

The MDEQ developed a list of issues (see Appendix D) for the Phase II Discussion Group to consider that synthesizes the work of the Phase I Discussion Group with program implementation issues raised by MDEQ staff. This list was intended to provide a macro perspective of program issues to facilitate integration of the more detailed issues presented in the Phase I Discussion Group. The subgroups were asked to consider in their deliberations the Phase I Discussion Group and MDEQ issue lists, plus issues raised by participants or during public comment at subgroup meetings. It was left to the members of the subgroups, with the help of the facilitator, to select the topics being discussed and to allocate the available time appropriately.

Administration Subgroup

Recommendations

The original Part 201 Discussion Group concluded that there is a need to optimize Michigan Department of Environmental Quality (MDEQ) administration of the Part 201 program in order to enhance the credibility of the program and achieve program objectives. To that end, it charged the Part 201 Administration Subgroup with making recommendations to improve internal MDEQ processes and program administration in order to (1) increase meaningful risk reduction as measured through redevelopment and/or response activities implemented (i.e., remedial action plans, interim responses, due care plans), and (2) establish effective methods and indicators that can be used to measure and benchmark progress.

The Administration Subgroup developed four priority goals related to program administration:

- Encourage positive interaction between stakeholders and the MDEQ
- Create incentives for source control
- Improve the cost-effectiveness of state cleanup program resources
- Use effective methods and indicators to measure and benchmark progress

The goals and recommendations for achieving the goals are described below. Please note that many of the recommendations address more than one of the four goals listed above, but are placed under the heading to which they best apply.

ENCOURAGE POSITIVE INTERACTION BETWEEN STAKEHOLDERS AND THE MDEQ

Group members have indicated that there is some distinct difference between the public health protection goals of the MDEQ and the redevelopment interests of the regulated community under Part 201. There are nonliable parties that are attempting to do some cleanup in order to redevelop a site. These nonliable parties have expressed concern that the Part 201 program regards them as adversaries. To encourage positive interactions between the MDEQ and all stakeholders, including liable parties, the subgroup has made the following recommendations:

1. Use the **comprehensive checklist** as recommended by the Complexity Subgroup (see recommendation 43 below).
2. When requested and as staff and financial resources allow, **early scoping meetings** should be held between the MDEQ and regulated parties. The regulated party should bring all available information about the site to the meeting, and the MDEQ should bring the comprehensive checklist to determine necessary response activities. It is recognized that, due to lack of information, reaching agreement on courses of action for certain activities may not be possible, but to the extent possible, the goal of the early scoping meeting should be to establish an agreed-upon final course of action for as many response activities as possible.

3. Support the MDEQ's ongoing **quality-control efforts** to train staff in a number of skill areas with the goal of improving consistency across district and field offices and empowering staff to make decisions.
4. There are recognized inconsistencies and challenges presented by the current definition of "facility." There is a need to recognize and protect against public health exposures while considering the potential stigmatizing effects on property values. To resolve this issue while maintaining the current liability scheme, the Administration Subgroup discussed creating the following **dual definitions for "facility"**:

Facility for purposes of liability determination: Responsible parties, or potentially responsible parties, would be liable for the entire extent of the contamination at a site, including its off-site migration. This would be referred to as the Part 201 zone, liability facility, or some other term to be determined by the MDEQ. This zone should be mapped and clearly defined to include any off-site migration that has occurred and should refer to specific tax identification numbers where possible. This existence of the zone should be communicated to the state and to any subsequent owner/operator of the facility. The zone map must be disclosed to nonliable owners of private property included in the zone.

Facility for purposes of public health protection: Properties that become part of a Part 201 zone (see paragraph above), and for which there is a known, or likely potential, exposure threat as a result of on-site migration, would be referred to as an existing/potential Part 201 exposure sites. Responsibility for limiting exposures rests with the property owner, including disclosure to prospective purchasers. Liability for the contamination rests with the party liable for the Part 201 zone.

No recommendation could be reached on the topic, but the subgroup agreed that noting the discussion was important.

CREATE INCENTIVES FOR SOURCE REMOVAL

There is wide support for development of incentives to increase the use of source removal in cleanups. Removing the source of contamination early in the cleanup process provides the most effective protection for public health and may be the most cost-effective response tool in the long run. Two of the major challenges associated with source removal are the cost of source removal activities and the time associated with the permitting process. To address these challenges, the subgroup has made the following recommendations:

5. Develop a **common definition of source, source removal, and source control**. This is a necessary step in the process of developing incentives. For example, the definition for source control could be: "Source control is destruction, containment, recovery, or any other legal means to prevent continued substantial expansion of the extent of contamination."
6. Create a **source removal low-interest loan program**. Because source removal activities are so expensive, most parties spend small incremental amounts over a long period of time, which may add up to more than the cost of initial source removal activities. A **source removal low-interest (below market rate) loan program** could help parties finance their up-front source removal costs and match their business

needs for small incremental costs over time. This approach may encourage source removal by creating a tool that is sensitive to the budget or operational philosophy of a business. This program should be available to liable parties and nonliable parties as a tool to fulfill, in part, Part 201 obligations through source removal.

7. Create **tax-credit incentives** to entice parties to conduct source removal and help finance the effort. These incentives should be available to liable parties as well as nonliable parties as a tool to fulfill Part 201 obligations.
8. The MDEQ should develop ways to **expedite source removal activities** through a combination of one or more of the following: a general permit process, a fast track process, and/or exemptions. See Appendix E.

IMPROVE COST-EFFECTIVENESS OF PROGRAM RESOURCES

Group members have suggested that the process of administering Part 201 must be made more efficient. Concern has been expressed that there are roadblocks in the program administration that hinder the goals of Part 201. The Administration Subgroup recommends consideration of the following concepts that may achieve improvements in efficiency.

9. Shifting to a **permit-based system** to administer Part 201 may potentially improve the program; however, as a radical departure from current program administration this would require in-depth consideration of potential benefits and detriments. The Administration Subgroup recommends further review of a Part 201 permit process by a joint MDEQ and stakeholder work group. The permit-approach conceptual framework found in Appendix F should be used as a starting point.
10. The MDEQ should reduce the need for the agency to pre-approve specific aspects of response actions through such mechanisms as **a general permit process, a fast track process, and/or exemptions**. See Appendix E.
11. **Map the current Part 201 administrative process** (including any changes instituted as a result of the Part 201 Discussion Group review process) to locate the current inefficiencies and direct resources for improvements. A visualization tool that could facilitate this is Value Stream Mapping.
12. Due to the work load demands on MDEQ staff, the review and approval of work plans, interim response action plans, or remedial action plans may be difficult to obtain in a timely manner. For some projects this can result in significant cost from construction delays and/or lost revenue. Therefore, **the MDEQ should offer the option of using the services of a third party professional** to assist in the performance of technical review, at the cost of the party proposing the work. In those cases where the review costs are less than the cost of delays, it would make an attractive alternative for the proposing party. The following issues should be considered in implementing this recommendation:

The third party professional selection process should be pre-qualified by the MDEQ.

The third party would work for, and report to, the MDEQ.

Funding for the third party would come from the party proposing the work, either directly or through a fund set up for that purpose.

The budget and schedule would have to be fixed prior to initiating the review to allow the party proposing the work to decide whether to pursue the third party review option.

The MDEQ would specifically indicate the components of the MDEQ review to be completed by the third party.

The MDEQ would complete a cursory review of the third party work and would have ultimate decision making authority for the project.

13. There appears to be little value returned for the program investment in **site scoring**; therefore, the requirement to do so should be removed from the statute.

USE EFFECTIVE METHODS AND INDICATORS TO MEASURE AND BENCHMARK PROGRESS

The following recommendations should be implemented to measure and benchmark progress of the Part 201 program.

14. The MDEQ should **continue its current effort to measure *agency performance*** of specific activities undertaken to administer the program for transparency and to assist the MDEQ in making a business case for securing program resources (e.g., FTEs), the information collected from this effort should be **reported to the public**.
15. **The MDEQ should create a stakeholder group to consider developing metrics for a tracking and reporting system** that evaluates agency performance and risk reduction achievement. Suggested metrics can be found in Appendix G and should be used as a starting point for future stakeholder group discussion.

Brownfields Subgroup

Recommendations

PURPOSE OF THE BROWNFIELD REDEVELOPMENT PROGRAM(S)

The Brownfields Subgroup has adopted the following purpose statement to guide the development of their recommendations:

To promote and facilitate the revitalization, redevelopment, and reuse of certain property that is contaminated (real or perceived), blighted, or functionally obsolete.

PUBLIC ACT 381 AND BROWNFIELD TAX CREDITS

The Brownfield Redevelopment Financing Act (P.A. 381 of 1996) and other state brownfield programs have been found to be useful tools for encouraging redevelopment of brownfield and contaminated sites in Michigan. These programs provide incentives to invest in property that has been used for industrial, commercial, or residential purposes and to keep that property in productive use or return it to productive use. The brownfield programs reduce urban sprawl and effectively encourage the continued use and investment in the existing infrastructure in our cities. The programs also serve as additional economic development tools that have resulted in investments in companies in Michigan that would not have occurred otherwise.

With key provisions of P.A. 381 and P.A. 382 (the Single Business Tax credit) expiring at the end of 2007, there is a need to continue tax incentives and the ability to fund projects through school tax capture and tax credits to promote redevelopment in urbanized areas. The subgroup has also identified opportunities for expanding or allowing additional activities that would be eligible for brownfield funding, and legislative changes that would both streamline the process and make brownfield sites more attractive for redevelopment. Recommendations are as follows:

16. The state should secure the ongoing operation of the section of the Brownfield Redevelopment Financing Act related to the approval of work plans by eliminating the sunset provision (December 31, 2007) on the approval of work plans for school tax capture (amends P.A. 381, Section 15 (1)(a)).
17. The state should authorize continuation of Brownfield Tax Credits within the expiring Single Business Tax (SBT) and institute an equivalent tax credit in the replacement business tax structure. This should include a preservation and transfer of all SBT credits with pre-approval letters issued on or before December 31, 2007, in a manner that allows a similar credit to be claimed against a replacement business tax of general application, subject to most of the limitations currently contained in P.A. 382 (e.g., five- or ten-year completions deadline and ten-year carry forward).
18. The relevant state agencies should convene a working group with legislators, municipalities, practitioners, and other stakeholders to consider these and the

following recommendations and, where appropriate, develop legislative amendment(s) for implementation.

Amendments are needed to improve operation of the Brownfield Redevelopment Financing Act. Among such amendments are the following:

19. Modify the definition of “eligible property”² to include “qualified agricultural property” if
 - the property would have been determined to be a “facility” as defined in MCL 324.20101, in the absence of the exemption from the definition of the term “release” under Part 201 that does not include contamination resulting from generally accepted agricultural and management practices (amends Section 20101 (1)(bb)(iv));
 - the property or adjacent or contiguous property is served by municipal water and sewer infrastructure; and
 - the property is included in a master plan and zoned to permit residential, commercial, or industrial use.
20. All reasonable costs for preparation and administration of brownfield plans and work plans should be considered eligible activity costs or otherwise eligible for reimbursement under a brownfield plan, whether performed by environmental consulting firms, law firms, or others.
21. Allow demolition and asbestos/lead abatement as eligible activities for facilities and blighted or functionally obsolete properties in noncore communities (amends P.A. 381, Section 2(m)).
22. Raise the local dollar limit for brownfield redevelopment authority’s (BRA’s) annual administrative costs to allow more flexibility. The local limit on the BRA has unduly burdened some communities that have a large number of brownfield sites (amends P.A. 381, Section 13(16)(a)).
23. Allow for the relocation of public buildings or operations for economic development purposes without the need for prior approval of the Michigan Economic Growth Authority (MEGA) if the project is not requesting school tax capture for that specific activity (amends P.A. 381, Section 2 (m)(v)).
24. Clarify and streamline the approval of brownfield plans that includes more than one parcel allowing incorporation of adjacent and contiguous properties. Delete the requirement that MEGA approve local tax capture for adjacent and contiguous properties (amends P.A. 381, Section 13 (15)).
25. The MDEQ should adopt a new policy, in consultation with the Michigan Department of Treasury and MEGA, that defines a reasonable rate of interest as an eligible expense to be paid for by school tax capture and defines the circumstances when interest will be approved as an eligible activity as part of P.A. 381 work plan approvals (see recommendation 26 below).

² The MDEQ recommends that land that is being used or was used for agricultural purposes and that has not yet been developed be specifically excluded from the definition of eligible property and be ineligible for funding under the MDEQ Brownfield Grant and Loan Program.

26. The MEGA board should adopt a revised policy, in consultation with the Michigan Department of Treasury and MDEQ, which defines a reasonable rate of interest as an eligible expense to be paid for by school tax capture and expand the circumstances when interest will be approved as an eligible activity.
27. Some of the current core community redevelopment incentives should be expanded to include other developed, urbanized areas, while simultaneously increasing the dollar value of redevelopment incentives for the core communities, to enhance the policy objective of directing development investment toward urban centers.
28. The MDEQ should consider incentives and approval of additional response activities in a work plan if such activities are necessary to clean up a property to a level (up to and including “generic residential” status) to reduce long-term Part 201 due care obligations and create additional environmental benefits.
29. Allow the discretionary use of local tax capture for the reimbursement of site investigation, baseline environmental assessment (BEA), and due care activities that have occurred before the adoption of the brownfield plan.
30. Upon approval of a brownfield plan, allow the use of school tax capture without P.A. 381 work plan approval for site investigation activities necessary to conduct a BEA (or new process for establishing liability protection under Part 201), evaluation of due care, and preparation of a BEA report and a due care plan. This does not include construction/implementation of BEA/due care measures (amends P.A. 381, Section 13(16)(b)).
31. Reduce the public notification requirement to one notice in a newspaper of general circulation designated by the municipality, which is not less than 10 days before the date set for the hearing (amends P.A. 381 Section 13(10)).
32. Expand the notification requirements of the Brownfield Redevelopment Authority to include the MDEQ when the brownfield plan includes capture of taxes levied for school operating purposes to use for BEA, due care, or additional response activities and/or Michigan Economic Development Corporation when the brownfield plan includes activities that must be approved by MEGA (amends P.A. 381, Section 13 (13)).

Amendments are needed to improve operation of the Brownfield Single Business Tax Credit (P.A. 382 of 1996) and should be incorporated in the act's replacement. Among such amendments are the following:

33. Allow qualified taxpayers to claim a refundable tax credit at a discounted rate when they receive a Certificate of Completion.
34. The MEGA board should adopt a more simplified process and form for approval of “mini” credits (\$200,000 or less) and without the need for a public hearing to approve changes to the mini credit form.

BROWNFIELD PROGRAM COORDINATION AND FACILITATION

The present state government structure to implement the brownfield programs is confusing, therefore the following recommendations are offered to clarify the state's role and assign coordination responsibilities to one entity.

35. As an important step in focusing state government's attention to redevelopment issues, the governor should establish an Office of Brownfield Redevelopment to coordinate and streamline all agency programs to support and facilitate the completion of Michigan's brownfield redevelopment projects. This office would:

- Coordinate agencies' policies on brownfield issues
- Establish brownfield priorities and facilitate key brownfield projects
- Propose administrative and legislative reforms and funding initiatives
- Develop education and outreach programs, including a consolidated website on brownfield programs, for local units of government and practitioners

BROWNFIELD UNIFIED APPLICATION PROCESS

The current system for applying for brownfield tax credits, tax increment financing (TIF), brownfield grants and loans, and other brownfield incentives is disjointed among several departments and divisions. If all Michigan brownfield redevelopment incentives for a project could be discussed at the same time at the beginning of the process, policies among agencies (and within agencies) could be aligned and there would be greater consistency within and among the various programs and agencies. Furthermore, the applicant could move forward with some level of certainty as to the type and scope of brownfield assistance available to the project, what additional information may be necessary, and the time frames involved.

This approach would

- compress time frames for brownfield projects through a coordinated state agency approach and minimize the time and expense of preparing various extensive and detailed applications for different brownfield programs that might not be appropriate for the project;
- provide greater certainty to projects with respect to receipt of state brownfield incentives;
- improve communication between state agencies and among divisions/sections within agencies;
- allow for all projects receiving state brownfield redevelopment assistance to be tracked using the similar metrics.

The following recommendations were developed to implement such an approach:

36. The state should create a unified brownfield redevelopment preliminary application that could be used by all state agencies and local units of government for brownfield-related program incentives, grants, and loans (business tax credits, notice of intent, P.A. 381 work plans, brownfield grants and loans, etc.). This short application would contain at least enough information to determine which state agencies should attend a project scoping meeting.
37. Upon receipt of the unified application, the Office of Brownfield Redevelopment should identify a lead agency on the project and ensure that the lead agency will coordinate a scoping meeting with relevant state agencies, the applicant, and local unit of government within a reasonable time frame.

38. The lead agency will draft a joint invitation letter to the applicant and include applications for specific programs for which the project is eligible, as identified in the scoping meeting.

WORK PLAN APPROVAL PROCESS

Current MDEQ administration of work plan approvals under P.A. 381 and Brownfield Redevelopment Grant and Loan Program projects have been identified as being too cumbersome, resulting in extensive time delays and additional costs in order to obtain MDEQ approval. This dynamic adds further complexity and cost to redevelopment of a brownfield site. Also, work plan approvals are often phased into smaller tasks, thereby increasing administration and transaction costs for the MDEQ's administration of the program. In order to achieve timely financing and implementation of brownfield projects and improve MDEQ administrative efficiencies, the following recommendations are offered:

39. Amend P.A. 381 Section 15 (4) to convey the following principles:

Modify language in Section 15(4) that requires the MDEQ to consider the sufficiency, necessity, and reasonableness of cost for *individual* activities. Instead, clarify that the MDEQ's responsibility for work plan review is to ensure the proposed response activities are protective of the public health, safety, welfare, and the environment. If a work plan proposes response activity that goes beyond the minimum necessary to comply with Part 201 and 213 requirements that apply to the proponent of the plan, the MDEQ should determine whether those costs provide meaningful environmental or public health benefit at a reasonable cost (including reducing long-term obligations), and those costs may be approved as eligible activities to be paid for with captured school operating taxes.

Express clearly that the financial risk contained in ensuring that the work performed is an eligible activity is on the person seeking reimbursement for "eligible activities," so that the MDEQ's approval of a work plan does not imply an entitlement to reimbursement for eligible activities.

40. In light of this body of recommendations, serious consideration should be given to amending P.A. 381 Section 15(3) to reduce the 60-day time frame for review of work plans.

These same principles should be applied to the MDEQ's Brownfield Redevelopment Grant and Loan Program.

FUNDING

In recognition of the previous recommendations and the fact that the state is depleting the brownfield grants and loans fund, the state should identify or develop new, stable, and ongoing revenue source(s) for funding state- and local unit-sponsored brownfield redevelopment programs.

One mechanism to do this was developed and discussed by the subgroup:

41. Upon the approval of interest as an eligible expense reimbursable with school operating taxes in a P.A. 381 work plan (see recommendations 25 and 26), allow the

approval of a work plan for school tax capture to provide two mills of the captured State Education Tax (SET) to be used to support the administration of the state's brownfield programs (up to one mill) and the MDEQ's Brownfield Redevelopment Grant and Loan Program (not less than one mill).

There is also a need to accelerate the funding of the local site remediation revolving funds and thereby financially empowering local brownfield authorities to encourage timely redevelopment of brownfield sites. The subgroup proposed the following recommendation to address this:

42. Allow the diversion of a certain percentage of local tax capture to be placed in the local site remediation revolving fund, during the time of capture that is required for paying the costs of "eligible activities" on a brownfield project, provided that there is no net fiscal impact to school tax capture (amends P.A. 381 Section 13 (5)).

Complexity Subgroup

Recommendations

The recommendations of the Complexity Subgroup are intended to reduce the complexity of the Part 201 program. It should be recognized, however, that even if the recommended program changes were made, the Part 201 program will remain complex.

PART 201 PROJECT CHECKLIST

The Complexity Subgroup discussed the value of a Part 201 checklist in managing, and in some respects reducing, the complexity of the Part 201 programs.

A comprehensive checklist would help address complexity in three ways:

- To the extent that the information needed and expected from a party is detailed in the checklist, complexity could be more efficiently managed.
- The checklist will facilitate improved communication about the needs and expectations of the regulated community and the Michigan Department of Environmental Quality (MDEQ), including expected outcomes from the regulatory process.
- As complexity is more efficiently managed, it will be reduced.

A work group of the Complexity Subgroup developed a Part 201 Project Checklist (Appendix H) as a tool to encourage the efficient and timely evaluation and implementation of response activities. The checklist is intended to assist in documenting status, guiding progress, and helping to determine the necessary response activities at sites of environmental contamination. Suggested guidelines for implementing the checklist are found in Appendix I. Recommendations are as follows:

43. The draft Part 201 Project Checklist is endorsed as a tool to manage and reduce complexity.
44. The checklist work group of the Complexity Subgroup or another appropriate stakeholder group should continue to work with the MDEQ in pilot testing the checklist, refining it and developing it for implementation.
45. The checklist should be pilot tested with the following considerations:
 - One possibility is to have a two-part or three-part initial pilot test over approximately three months.
 - The first part of the pilot test would involve asking consultants and others in the Part 201 work group who have or will soon have projects in the early stages of MDEQ involvement to prepare Part I and possibly Part II of the checklist (as applicable), to generate some initial feedback on the practical value of the checklist.
 - A short survey should be completed by the initial testers and returned to the Remediation and Redevelopment Division (RRD) for distribution to the work group for evaluation.

The second part of the pilot test could involve selection of a group of projects, perhaps in multiple MDEQ districts, for testing of the checklist, with similar feedback requested.

Although this has not been thoroughly discussed, a possible third part of the pilot test would be to post the checklist on the RRD website, invite its use, and encourage feedback.

46. Once feedback is received (ideally in 90–120 days), the checklist would be modified as appropriate and made available for widespread distribution and use.
47. Over time, the MDEQ should assess the value of the Part 201 Project Checklist and, with stakeholder involvement, consider whether its use should become a program requirement.
48. Financial resources permitting, the public information contained in the checklists eventually could be used as a “quick summary” on all sites or facilities and would be available to the public on an ongoing basis, preferably on the Internet.
49. Again, depending upon financial resources, the checklist could be the “table of contents” for the information available on the Internet about a site or facility, with embedded cross-referenced links that allow quick access to other information, such as baseline environmental assessments (BEAs), work plans, remedial action plans (RAPs), etc. These would be submitted to the MDEQ in PDF format or scanned by the MDEQ, uploaded to the Internet, and thereby made readily available to the public and at lower cost.

DETERMINING THE GROUNDWATER SURFACE WATER INTERFACE (GSI) CRITERIA WHERE THE INTERFACE IS VIA AN NPDES-PERMITTED STORM SEWER

When venting groundwater enters surface water via a storm sewer, the appropriate mixing zone can be used to determine compliance with the Groundwater Surface Water Interface (GSI) criteria. Under previous MDEQ policy, however, if the storm sewer is under the jurisdiction of a municipality regulated by a Phase I or Phase II National Pollution Discharge Elimination System (NPDES) permit, the venting groundwater entering the storm sewer is regulated as an illicit discharge, and no mixing zone is allowed.

To address this situation, the MDEQ developed its January 16, 2007, *Strategy for Part 201/213 Facilities with Contaminated Groundwater Venting to MS4 NPDES Permitted Storm Sewers* which provides that upon notice to the permittee, a facility would develop compliance values using mixing zone-based criteria. The Complexity Subgroup recommendation is as follows:

50. The MDEQ should finalize the draft January 16, 2007, *Strategy for Part 201/213 Facilities with Contaminated Groundwater Venting to MS4 NPDES Permitted Storm Sewers*, make the necessary program changes, provide appropriate staff training, and implement the strategy.

GROUNDWATER SURFACE WATER INTERFACE—UTILITY CORRIDOR OFF-RAMP MODEL

The GSI pathway has been identified by the MDEQ and the regulated community as a pathway that can significantly slow the review and approval process of a RAP or an interim response designed to meet criteria (IRDC) because under current Part 201 procedures, facilities must go through a highly detailed process to demonstrate whether the GSI is or is not a relevant pathway. A complicating factor in addressing the GSI pathway occurs when a contaminated groundwater plume intercepts or has the potential to intercept a utility corridor. In that situation a determination must be made whether the utility corridor represents a preferential pathway that will result in the contamination impacting surface waters.

Substantial data collection and analysis may be necessary to verify that this pathway is not relevant or does not pose a risk. Other potential complicating factors in reviewing GSI pathway issues in the presence of utilities and utility corridors include the difficulty of (and risks associated with) sampling within utility corridors, as well as consideration of the potential upstream and downstream contributors along the corridors and within the utilities.

The use of a model with appropriate generic and site-specific input parameters would greatly reduce the complexity of these determinations. There is a set of generic input parameters that are sufficiently conservative to be valid on a statewide and/or regional basis, which, along with a reasonable set of site-specific parameters, would be sufficient to run the model. The model could be used to establish fixed off-ramp parameters (e.g., based on a set multiple of the generic GSI criteria and a fixed distance to the discharge point) or to establish a formula for ranges of off-ramp parameters (e.g., based on ranges of concentrations and distances). To be effective, the off-ramp parameters should be simple and based on information that is readily ascertainable from normal site characterization efforts. An example of such a model that was presented to the Complexity Subgroup at the December 11, 2006 (see Appendix J).

The MDEQ has raised concerns that the generic input parameters might not provide a sufficient degree of conservatism in certain situations, and recommended the use of more site-specific input parameters. However, the use of generic criteria is critical to this approach for reducing complexity. Many, perhaps even all, of the issues raised by the MDEQ could be addressed with some additional effort, and the concerns raised relative to some types of contaminants should not preclude the development of a generic off-ramp for other classes of contaminants and site conditions. There is also a need for a site-specific model that could be used for sites where the generic input parameters do not hold. Recommendations are as follows:

51. The MDEQ, in consultation with stakeholders, should develop a model that uses generic input parameters and limited, easily attainable site-specific input parameters to predict acceptable alternative groundwater concentrations for the GSI-utility corridor pathway. If the site meets these alternative concentration criteria, the pathway would be satisfactorily addressed, and the model would serve as a GSI-Utility Corridor Off-Ramp from further consideration of this pathway.

52. Using a similar process, the MDEQ should also develop a site-specific model that would predict acceptable groundwater concentrations to satisfy the GSI pathway in situations and for sites where the generic criteria do not hold.
53. The MDEQ should move forward with both of these models, making them available in phases, as appropriate.
54. Using the generic GSI Utility Corridor Off-Ramp Model as an example, the MDEQ should develop, test, refine, and adopt similar off-ramp model procedures for other pathway determinations that could benefit from this process, particularly those that have been identified by the MDEQ and others as potential impediments to achieving site closures.
55. The goal is to utilize the technical experience accumulated in the 12 years of program implementation to develop tools (e.g., off-ramps or similar approaches) based on prudent risk management principles that will serve to reduce complexity, simplify compliance demonstrations, and increase the overall pace of cleanup without compromising protectiveness. Ideally, this effort would result in the development of a process that could be implemented on an ongoing basis by the MDEQ to identify and address issues that serve to unnecessarily increase compliance burdens on regulated parties and reduce overall program efficiency/compliance rates.

ISOLATED RELEASE ISSUE RESOLUTION

When a release of hazardous substances creates a “facility” that affects a relatively small portion of a larger property (i.e., the release is isolated from other known releases and from other potential environmental issues, such as recognized environmental conditions [RECs] at the property), it may be possible to remediate such a release fairly quickly. An example was presented to the Complexity Subgroup for discussion:

- The example is an isolated trichloroethylene (TCE) spill at a large manufacturing site that is presently not known to be a “facility” under Part 201, but which has typical RECs for a manufacturing site. In this example, the TCE plume is fully delineated, scans for other hazardous substances were below applicable criteria, and delineation efforts demonstrate that the subject plume has not commingled and will not commingle with other releases at the property. The owner/operator seeks MDEQ approval of a RAP and ultimately closure for this isolated TCE spill, without being required to investigate all RECs at the property.
- In the example, the owner/operator is concerned that if it seeks approval of a RAP for this TCE cleanup, it will be obligated to conduct a full investigation of all RECs before getting approval of a RAP or IRDC for the TCE spill.
- Expanding the scope of the response in this way would add complexity to a relatively simple problem, go beyond the known issue of concern, increase the cost, and slow down the process of addressing the known issue.
- If the owner/operator anticipates that the MDEQ will require a full investigation of all RECs, the owner/operator will likely choose to address only the isolated issue through independent action, with no MDEQ involvement.

In response to this concern, the MDEQ stated that in appropriate circumstances the statute and regulations currently allow approval of a RAP and closure for a “facility” that

is smaller than the overall property held by the owner/operator. The MDEQ developed a document entitled “Single Release Resolution,” which detailed its evaluation of MDEQ authority to allow such an approach and reviewed that with the Complexity Subgroup.

The MDEQ was careful to state that it would not use this approach if it would require the MDEQ to ignore obvious releases or potential releases. Because of the RECs at the larger property, the MDEQ reserves its right to issue a notice or require additional action to consider/investigate the RECs on the property if, in the MDEQ’s opinion, such action is deemed necessary under Part 201.

Members of the subgroup commented that while the MDEQ’s “Single Release Resolution” document is a step in the right direction and indicates a willingness in some situations to approve a RAP for an isolated incident, it provides little guidance on what specific criteria the MDEQ would apply in making its decision on whether to require action on the larger site.

As a guide, it would be helpful and appropriate for the MDEQ to provide examples of circumstances in which the isolated release would not be handled independently of the larger site. The recommendations include:

56. The Single Issue Resolution document, with some clarifications, should be incorporated into a Part 201 Program Question and Answer document that would give examples of when the RAP for the isolated release could be approved without further involvement of the rest of the property.
57. In addition, the MDEQ should provide information and training materials to its staff to assure they are aware of this approach.
58. The MDEQ should continue to involve stakeholders in refining its guidance on this issue.

MERCURY I

The MDEQ’s Water Bureau has established a Water Quality Standard (WQS) variance procedure for mercury discharges regulated by NPDES permits. This variance procedure is set forth in the Water Bureau’s “Mercury Permitting Strategy Implementation of Method 1631 for Fiscal Years 2005–2009,” May 14, 2004 (hereafter, the Mercury Permitting Strategy).

According to the Mercury Permitting Strategy:

The majority of ambient waters sampled for mercury were shown to exceed Michigan’s 1.3 nanograms per liter (ng/l) water quality standard.

Due to ubiquitous mercury concentrations in Michigan’s surface water, most surface water discharges are not able to comply with the 1.3 ng/l mercury water quality standard without extraordinary treatment costs.

To address this situation in NPDES permits, a multiple discharger variance (the Mercury Permitting Strategy) was developed consistent with the requirements of the variance rule, R 323.1103(9). Where various conditions (e.g., naturally occurring or human-caused pollutant concentrations) prevent the attainment of a

water quality standard, Rule 1103 allows for a variance from a water quality standard that is the basis for a water quality-based effluent limit (WQBEL) in an NPDES permit.

The use of a multiple discharger variance is appropriate because of ubiquitous mercury levels in Michigan waters at levels that exceed the water quality standard and because immediate enforcement of a 1.3 ng/l WQBEL for mercury would force extraordinary end-of-pipe treatment at many existing facilities, resulting in an unreasonable economic burden for these facilities.

Data from Michigan parties using low-level mercury analyses indicate that a level currently achievable (LCA) of 10 ng/l is achievable for most point source dischargers and the Mercury Permitting Strategy sets the LCA for direct discharges to surface waters at 10 ng/l.

The Mercury Permitting Strategy furthers the goal of attaining the water quality standard for mercury through continued implementation of pollutant minimization plans. Each NPDES permit that contains a mercury LCA also contains a requirement to develop and implement a pollutant minimization plan for mercury.

The use of the multiple discharger variance procedure for mercury will not result in an increase of mercury levels in point source discharges.

No such variance exists for sites regulated under Part 201 that are required to meet the generic groundwater cleanup criterion for the GSI for mercury of 1.3 ng/l established under Part 201, which is identical to the Part 31 water quality standard. The U.S. Environmental Protection Agency (U.S. EPA) has advised the MDEQ that the U.S. EPA is not willing to approve a revision of Michigan's water quality standards to expand the mercury variance beyond the variance available for NPDES permits.

While the U.S. EPA's authority to approve or reject a variance procedure under Michigan's NPDES program is clear, that authority is not as clear in matters relating to Michigan laws and rules pertaining to the Part 201 program, which is not a federally delegated program.

The mass of mercury venting to surface waters from groundwater at facilities regulated under Part 201 is estimated to represent an extremely small percentage of the total load of mercury entering Michigan's surface waters because (1) such mercury discharges are of finite mass in plumes venting at low flow rates from locations where the source of mercury contamination has already been terminated, and (2) atmospheric deposition and other ongoing sources of mercury represent a continuing mass loading of mercury into surface waters far exceeding loadings from venting plumes.

The MDEQ has found that requiring point source discharges to control mercury discharges in order to meet a water quality criterion of 1.3 ng/l would require extraordinary treatment costs that are neither prudent nor feasible. Likewise, similar extraordinary treatment costs would be needed for venting groundwater plumes to be controlled sufficiently to meet this criterion.

If the groundwater plume were pumped and discharged, an NPDES permit would be required, and the discharge would qualify for the 10 ng/l variance concentration provided

under the Mercury Permitting Strategy. It is therefore appropriate that if the groundwater plume were allowed to vent to the surface water, the same concentration limitation should apply.

Rule 324.20120a, Section 20120a(15) of Part 201 provides that: “If a remedial action allows for venting groundwater, the discharge shall comply with the requirements of Part 31, and the rules promulgated under that part **or an alternative method established by rule** (emphasis added).”

Therefore, the MDEQ has authority under Part 201 to establish by rule an alternative method for determining the appropriate mercury GSI criterion.

Based on this information the subgroup encourages the MDEQ to:

59. Consider utilizing its authority under Section 20120a(15) of Part 201 to establish by rule an alternative method for determining the GSI cleanup criterion for mercury. This alternative method could be used to establish, in rule, the GSI cleanup criterion for mercury at 10 ng/l, consistent with the level established under the Part 31 Mercury Permitting Strategy. Also, consistent with the Mercury Permitting Strategy, the 10 ng/l would apply upon demonstration that mercury pollutant minimization has been accomplished through termination of the activity that caused the mercury contamination of the site, and further that control or recovery of any sources of concentrated mercury that remain on site has been achieved, such that over time, progress will be made in off-site mercury concentrations reaching either background levels or the generic criteria of 1.3 ng/l.

MERCURY II

The mercury water quality standard of 1.3 ng/l established under Part 31 to protect wildlife and human health utilizes a single bioaccumulation factor (BAF) in deriving the ambient water quality criterion. Part 201 uses the Part 31 mercury water quality standard for the mercury GSI criterion.

The BAF may vary significantly, especially between ecosystems. Site-specific measurement of fish tissue and water mercury concentrations is a viable method of determining whether the BAF used in establishing the 1.3 ng/l water quality standard is relevant to local surface water resource protection. Use of a site-specific BAF (which may often be lower in some rivers than that used to establish the 1.3 ng/l standard) may identify a different concentration to be protective of surface water resources.

The subgroup encourages the MDEQ to:

60. Clarify a process under Part 201 by which a party can establish a site-specific BAF through site-specific fish tissue and ambient water quality sampling and determine a site-specific GSI mercury criterion.

ADDRESSING CONSERVATISM IN DECISION MAKING

Achieving the goal of reducing complexity requires that specific actions be implemented to address the conservatism that is structurally built into the program. An example is the

conservatism resulting from a Part 201 statutory provision that gives the MDEQ only one opportunity or “one bite at the apple” when making decisions on plans submitted under Part 201.

In addition to this structural issue, there appears to be a policy consideration related to the degree of conservatism the MDEQ applies in implementing Part 201. While a conservative decision-making approach may have the intent of maximizing risk reduction at a given site, this approach may also result in fewer sites being remediated over time.

Moving more sites to cleanup and closure than would otherwise be achieved under a more conservative decision-making system could decrease the overall risk level in the state.

“One Bite at the Apple” Issue

The MDEQ has advised the Complexity Subgroup that the following statutory language gives the MDEQ only one opportunity (one bite at the apple) to identify all relevant issues at a site as it fulfills its statutory obligation to evaluate and issue a decision on any plan submitted under Part 201, and that this creates a situation in which the MDEQ must take extreme care in its determinations, thereby giving rise to a decision-making environment and thought process that is very conservative.

Section 324.20114(8) of Part 201 provides:

*Any request for approval of a plan shall be granted or denied within six (6) months of submittal of the information necessary or required for the department to make its decision. If the department does not approve the plan, the reasons for the denial shall be provided by the department in writing with a complete and specific statement of the conditions or requirements necessary to obtain approval. **The department may not add additional items to this statement after it has been issued.** Failure of the department to act within the specified time period shall result in the request being considered approved. The time frame for decision may be extended by the mutual consent of the department and the person submitting the plan (emphasis added).*

The MDEQ has reviewed this statutory language with the Attorney General’s Office, and has been advised that it is prudent to assume the statutory requirement applies to MDEQ decisions on all plan submittals under Part 201.

While the statutory requirement to identify all issues at the time of a decision has obvious benefits for the regulated community, this specific statutory requirement may tend to force the MDEQ to be exhaustive in considering any issues that are potentially of concern.

Most Part 201 projects are developed incrementally, and there is a need to build a project record through multiple decisions by the MDEQ. Also, there is a value in having decisions made at the MDEQ district office level whenever possible.

To the extent that the “one bite at the apple” requirement tends to drive overly conservative reviews and may be a hindrance to incremental decision making and moving decision making lower in the chain of command, it would be beneficial to consider a

range of approaches for dealing with this issue. The subgroup's recommendations include the following:

61. The MDEQ should form a small work group to develop options for addressing this issue. The work group should consider the full range of possible solutions, from procedural changes to a possible statutory change, as a last resort.
62. The MDEQ should review the level of conservatism it is currently applying in its site-by-site decision making and assess whether this approach, while perhaps more protective on an individual site basis, is in the larger picture resulting in fewer cleanups, which creates ongoing greater risk to Michigan residents than would be the case if more sites were remediated. In setting policy direction for Part 201 decisions, the MDEQ should consider the reduction in risk that would be accomplished statewide if more sites were remediated to a less conservative level of cleanup.

REDUCING THE NUMBER OF LAND USE CATEGORY DIRECT CONTACT CRITERIA

The numerous land use categories and the corresponding pathways add complexity to the Part 201 program. Reducing the number of land use categories is appropriate and would help reduce complexity without substantially reducing the flexibility of the land use risk-based closure options.

MDEQ RRD Operational Memorandum No. 1 describes the residential, commercial, and industrial land use categories. Typically, the direct contact criteria under the various commercial land use categories do not influence the determination of a remedial action for a property. Only the soil direct contact criteria have Commercial III and IV subcategories. With the exception of commercial land use activities described in subcategory Commercial I, all other criteria that are protective of the worker population are applied to both industrial and commercial land uses.

The current land use categories (Residential, Industrial, and Commercial I, Commercial II, and Commercial III) can be reduced to two: Generic Residential (or unrestricted) and Generic Nonresidential (or restricted) with very little change in the applicable criteria. This change would affect only the Generic Cleanup Criteria for "Direct Contact," which are currently different for Commercial II, Commercial III, and Commercial IV. Under a two-category system, all three of those categories would be regulated the same way the current Industrial criteria are regulated.

The MDEQ could establish a nonbinding two-category system without rule or statute change. The three commercial categories would still be available upon request; however, there would rarely be any difference in cleanup criteria. The two-category system would be protective since the only differences among the three commercial direct contact criteria would be minor variations in the skin adherence factors, and the most restrictive (Commercial II) criteria would apply. This approach could be implemented by agreement of the parties not to use the Commercial III and IV categories.

This two-category approach could be pilot tested on a voluntary basis and if it is found to be desirable, appropriate rule changes could be made. If this change is made, at some point it may be necessary to reconcile the statutory language.

For the two categories, one could be **generic residential** or “**unrestricted**” And the second could be **generic nonresidential** or “**restricted**,” which would combine the current land use Industrial and Commercial II through IV categories, that is, **limited residential** or “**limited unrestricted**,” and **limited nonresidential** or “**limited restricted**.”

The recommendations under this item are as follows:

63. The MDEQ should proceed with appropriate program changes to reduce the number of land use categories to two:

Generic Residential (or Unrestricted):

This category would include the current generic residential and commercial I land use categories.

Nonresidential (or Restricted).

This category would include the current Industrial and Commercial II, III, and IV land use categories. Until such time as the exposure assumptions listed in the Part 201 rules are re-evaluated, the applicable criteria would be the most restrictive direct contact criteria of the current Industrial/Commercial II, III, or IV categories.

The use of the limited or “site-specific” categories would also be combined in a similar manner.

64. To implement this recommendation, while keeping the current multiple category system in place, the MDEQ should issue an alternative operational memorandum (Op Memo) under which a party would use cleanup criteria from one of the two new umbrella categories. The Op Memo would contain a table listing the applicable criteria under the two umbrella land use categories, which would be the most restrictive criteria in the current land use categories.

If, after a period of time it this approach is found to be widely used., to be less complex than the current approach, and to preserve necessary flexibility, the MDEQ should proceed with the necessary rule changes to establish these two land use categories in law. Appropriate statutory amendments should also be made.

VAPOR INTRUSION TO INDOOR AIR PATHWAY

The vapor intrusion to indoor air pathway is one of the most complex and challenging Part 201/213 pathways. The difficulties in implementing the Part 201 Groundwater Volatilization to Indoor Air Inhalation Criteria (GVIIC) and Soil Volatilization to Indoor Air Inhalation Criteria (SVIIC) lead to inconsistencies in approach and remedy selection, and create obstacles to achieving closure. The MDEQ is proposing a new approach for evaluating this pathway to improve predictions of vapor intrusion risk and provide easier closure decisions.

There have been various problems in implementing the generic GVIIC and SVIIC. As with many models, there are qualifiers, assumptions, and restrictions that must be met prior to application of the Johnson and Ettinger Model (JEM). The JEM inputs and generic land use conceptual models used for developing the generic GVIIC and SVIIC

may not represent the most commonly found physical conditions and exposure scenarios in Michigan. Consequently, the generic GVIIC and SVIIC cannot be used at many sites in the state. Lack of formal guidance on how to address the pathway when the generic criteria do not apply has created inconsistency and uncertainty in approach from site to site, as well as obstacles to achieving closure.

Although Rules 714(5) and 724(5) and related rules under Part 213 allow for other methods such as soil gas sampling to demonstrate compliance, only groundwater and soil data have been used to date to demonstrate compliance with the criteria for this pathway. Soil gas and indoor air results, although useful in identifying due care requirements or the need for further evaluation, are currently not acceptable for demonstrating compliance with criteria and reaching generic or limited closure.

The U.S. EPA has continued to update and recalibrate the 1991 version of its application of the JEM based on empirical data from across the country. These data were not available at the time the GVIIC and SVIIC were first developed. Sensitive inputs to the JEM now have fixed ranges established by the EPA to improve the predictive capacity of the model. What were originally considered conservative and representative estimates for certain input parameters at the time of the MDEQ's criteria development are now considered by the EPA to be outside these fixed ranges when taken in conjunction with all other input parameters.

The Complexity Subgroup of the Part 201/213 Phase II Discussion Group recommends:

65. In developing modifications to the process for addressing the vapor intrusion pathway under Part 201/213, the MDEQ should provide for a peer review/stakeholder process including a review and a comment period
66. The MDEQ should consider how the proposed program changes improve its ability to make decisions on a timely basis. For example, considerable delays could be encountered if the new approach requires samples over four quarters before a determination can be made that the site is a facility.
67. Soil gas sampling should not be required at every site. A procedure should be developed to use soil data to demonstrate that soil vapor testing is not needed. (This would serve as an off-ramp from soil vapor testing.)
68. The MDEQ should describe in Op Memos when and how data can be used in compliance demonstrations.
69. The proposed program changes listed below, originally proposed by the MDEQ and further developed by the Indoor Air Work Group of the Complexity Subgroup, should serve as the starting point for the MDEQ stakeholder/peer review process.

*MDEQ's Proposed Program Changes
To Be Uses As Starting Point
For the Stakeholder/Peer Review Process*

The MDEQ proposes to modify how the vapor intrusion pathway is addressed to include the use of soil gas.

Program Changes that Could be Made Now

- *Where GVIIC do not apply, the Acceptable Soil Gas Screening Concentrations (ASGSCs) and/or the Acceptable Indoor Air Concentrations (AIACs), which have already been developed by the MDEQ, may be used to demonstrate compliance.*
- *Develop the requirements and procedures for the collection of soil gas samples including sub-slab sampling methods.*
- *Develop the sample protocol requirements and procedures for the collection of indoor air samples for both residential and commercial/industrial situations.*
- *Develop the processes describing how decisions can be made to attain final closure for the vapor intrusion pathway under an interim response designed to meet criteria (IRDC), Baseline Environmental Assessment (BEA), and Due Care Section 20107a context.*
- *Develop the processes describing how a generic or limited closure can be attained.*
- *Complete the development of a decision flowchart for limited or generic closures.*

Program Changes Requiring Rule Modifications

- *Revise the JEM generic inputs used as the basis for the development of the generic GVIIC to reflect the state of the science. Default parameters used by the EPA in their Corrective Action and Superfund programs will be considered for this evaluation as well as those used by other state agencies including Michigan. Available case studies will also be considered to further aid the selection of appropriate default values for the development of updated Part 201 generic GVIIC and soil gas criteria.*
- *Replace the generic SVIIC with soil gas criteria.*
- *The EPA no longer recommends using bulk soil sample results for evaluating this pathway.*

Soil gas is considered more representative of vapor intrusion risk.

Soil gas is now the preferred media for conducting vapor intrusion investigations by EPA and many other States.

Modeling to predict vapor concentrations in soil is currently not recommended due to large uncertainties associated with the soil partitioning calculations in the JEM.

Soil gas sample results represent actual soil vapor concentrations below grade versus modeled predictions from soil data.

- *Develop and promulgate soil gas criteria as generic Part 201 criteria.*

70. The Complexity Subgroup recommends that the MDEQ consider the following additional issues during the stakeholder/peer review process:

Relative to the proposed program changes that could be made now:

Develop a mechanism by which the MDEQ can validate the accuracy and representativeness of the JEM model, default parameters, and the compliance methods established to regulate the indoor air pathway on an ongoing and Michigan-specific basis. This would be accomplished most easily by maintaining and periodically evaluating a database of case studies in which multiple lines of evidence (i.e., soil, groundwater, soil gas, indoor air, etc.) that characterize indoor air risk are available.

Relative to the proposed program changes that require a rule change:

Identify and evaluate methods for simplifying/streamlining the compliance demonstration requirements for this pathway, including, but not limited to: (1) consideration of “off-ramps” (conditions which, if present, would render the pathway incomplete or not significant, e.g., vertical/horizontal isolation distances, presence of an intervening layer of low vapor diffusivity, etc.); (2) identification of *de minimus* conditions (e.g., where a single exceedance of a criterion is observed in the midst of a large number of compliant measurements); and/or (3) development of compliance evaluation methods premised on representative statistical approaches as opposed to data-point-by-data-point compliance demonstrations.

Liability/Compliance Subgroup

Recommendations

OVERVIEW

The Liability/Compliance Subgroup was charged by the Phase I Discussion Group to evaluate the causation-based liability scheme in light of the past 10 years of experience and determine what changes are necessary to enhance the pace and number of cleanups while assuring that Part 201's goals are met.

LIABILITY PROTECTION FOR NONLIABLE OWNER OPERATORS

One important goal of the 1995 amendments to Part 201 was to encourage reuse of contaminated properties. The amendments established baseline environmental assessments (BEAs) to provide liability protection for new owners and operators of facilities and to create a basis for distinguishing old contamination from new contamination. After 10 years, there is general agreement among practitioners that while liability protections offered by the BEAs are worthwhile, other important statutory objectives of Part 201, including protection of the public health, safety, and welfare, were not being promoted or addressed by this process. The consensus is that revisions are needed to ensure protection of the public health while continuing to provide a means of liability protection for new owners and operators.

During the course of the subgroup deliberations, several deficiencies in the BEA system were identified. While BEAs are valuable to prospective purchasers as a means of liability protection, the BEA process is not useful to the agency because it often does not provide enough information about site characterization and does not provide for protection of the public from all of the conditions identified in the BEA. Conversely, due care plans are a means to specifically address any health exposure risks. Due care is defined as limiting unacceptable exposures and not exacerbating contamination, taking reasonable precautions and providing required notices in order to protect the public health. All owners and operators of facilities currently have due care obligations, with limited exceptions. While documentation of due care is currently required under the law, in practice it is recognized that compliance with this requirement is very low and not enforced.

Making development and adherence to a due care plan the basis for liability relief will secure performance of due care response activities in the long term. This approach will continue to provide liability protection to new, innocent owners and operators and it will better tailor the MDEQ's activities to fulfill its mandate to protect the public health.

The Liability/Compliance Subgroup recommends the following:

71. The process of assessing the site for purposes of developing an adequate due care plan should become the basis for achieving liability protection for existing (legacy) contamination present at a site at the time of purchase or occupancy by the new nonliable owner or operator.

72. The new liability protection mechanism should include a requirement to complete an all appropriate inquiry (AAI)-compliant Phase I environmental site assessment (ESA) (such as ASTM E 1527-05), a Phase II investigation to collect data with which to develop an adequate due care plan and prepare an appropriate due care plan. Successful completion of this process would provide liability protection for existing (legacy) contamination at the time of purchase or occupancy by the new owner or operator. Subsequent failure to maintain the due care plan would cause the owner or operator to become subject to administrative fines and penalties. The group did not reach consensus about whether liability for legacy contamination should be extinguished after the due care plan is written or after its elements are implemented.
73. The AAI-compliant Phase I ESA, the Phase II investigation conducted to define due care obligations, and the due care plan developed to comply with Section 7A obligations should be submitted to the MDEQ as is currently done in the BEA process. The due care plan should be based on sufficient subsurface site characterization data (Phase II data) to demonstrate the plan's adequacy.
74. The due care plan should be submitted to the MDEQ and subsequent transferees and periodically reviewed and updated by the owner/operator for compliance as long as contaminants remain that make the site a facility.
75. The transition to the due care plan liability exemption should be reviewed for impacts on agency workload and owner/operator obligations. In the absence of a property transaction, submission of due care plans should be staggered over the course of two or three years in order to manage the agency workload and reduce the cost of compliance to the regulated community.
76. Due care plans should refer to the Complexity Subgroup's pathway elimination checklist, designed to simplify the identification of necessary due care obligations for owner/operators. (See recommendation 43 in the Complexity Subgroup section.)

PERMIT APPROACH

The subgroup examined the potential benefits of employing a "license" or "permit-based" program to help streamline the regulatory process (see appendices F and K) while providing more timely and relevant data to the agency. In one scenario, all liable parties conducting cleanup and all nonliable owners/operators of facilities would be required to obtain a permit or license to operate. The permit/license model could shift the paradigm of the Part 201 program to one of enhanced cooperation between the regulated and regulating community by encouraging information exchange and allowing additional flexibility to meet stated goals. A cost recovery approach may still be used as backup where a permit system fails to induce responsible behavior by liable parties.

The subgroup suggested that the permit approach might be most appropriately applied to nonliable owners/operators because it would allow ongoing interaction between the regulated and regulating parties to ensure that owner/operator obligations are met throughout the course of occupancy. The permit would incorporate due care obligations as elements of compliance. This is intended to make owners/operators more aware of their due care obligations and allow the agency to make interim decisions.

The Liability/Compliance Subgroup recommends the following:

77. A permit or license-based regulatory structure should be examined by the MDEQ and a stakeholder group to determine if it would improve administration of and compliance with all aspects of the Part 201 program. Future considerations of this concept should reference appendices F and K.
78. The permit concept should be applied in the form of due care certification for nonliable owners and operators. (See recommendations 71–76 above.)

LEGAL DEFINITION

Owners/Operator of Common Property

The application of the terms *owner*, *operator*, and *facility* to real property interests under condominium and subdivision law in Michigan has unworkable and presumably unintended consequences. For example, in many cases, persons who purchase units in condominium developments have potential cleanup and due care obligations for common elements beyond their control and, in some circumstances, certain common elements which they have no right to use. These interpretations can apply to both residential and commercial property interests. In order to cure this discrepancy, the following is recommended:

79. Provide relief from the technical applications of the definitions to achieve a result whereby condominium associations and homeowner associations, not individual owners, are responsible for liability for common elements. This relief could be accomplished through exemptions from the current definitions or a new section which addresses these issues independently (similar to the secured lender exemption provisions).

STANDARDS AND RESPONSIBILITIES

Liability Standard

The causation-based standard used under Part 201 creates higher costs of enforcement for the MDEQ. However, a return to strict liability would be considered inequitable, economically disadvantageous, and politically infeasible. Conversely, a shift to proportional allocation of liability would present a larger “orphan” share of cleanups in Michigan. As a result of these conclusions, the subgroup recommends the following:

80. The part 201 program should retain the causation-based liability standard. The MDEQ requires additional enforcement authority as set forth below (see recommendations 59–63).
81. Retain the “joint and several” liability standard under Part 201 as it is currently defined.

Contribution Rights

Liable parties, wherever possible, should bear the cost of cleanup. Sites where contamination is the responsibility of several parties create costly and confusing delays about apportioning cleanup tasks. Current Part 201 contribution standards are not adequate to ensure that liable parties are accessible for contribution actions. The

following recommendation should be considered to improve the Part 201 contribution standard:

82. Part 201(29)(3) contribution language should be clarified. Suggested language is as follows: “A person who incurs response activity costs may seek contribution from *any person who is or may be* liable under section 20126”.

Statute of Limitations

The subgroup agreed that the statute of limitations language under Part 201(40) is difficult to interpret and can lead to undesired outcomes; the subgroup identified a need for revised language in the statute. However, the group agreed that while the statute of limitations language needs to be clarified, improving compliance rates is a more desirable and worthy endeavor.

Group members recognized that under the current statute of limitations, it is unclear when the six-year period begins and expires dependent upon the combination of private and state parties to the cleanup. Members explained that there are circumstances where the initiation of remedial action, by a private party, starts the clock for the statute of limitations. If the MDEQ or a private party seeking contribution gets involved at a later date, its claim may be considered time barred. One potential remedy is the use of tolling agreements. (A tolling agreement may extend the statute of limitations for natural resource damage claims.)

83. The statute of limitations must be revised under Part 201(40). Revisions should consider the use of tolling agreements to preserve the state’s claims when a private party initiates a cleanup.

COMPLIANCE

The MDEQ needs tools to reduce the time and resources to identify and pursue nonperforming liable parties. The following actions are recommended:

84. Develop incentives to encourage source removal that do not create unintended consequences. For example, some form of liability cap or other finality could be provided to a party that was liable for only a portion of the cleanup, but elected to complete source removal for entire site.
85. Create authority for the MDEQ to levy administrative penalties without involvement of the Attorney General’s Office, similar to penalties available under Part 213.
86. Expand the MDEQ’s information request authority under Section 17 to include access to corporate formation documents, ownership, or business structure records where relevant to determining the chain of liable parties.
87. Develop a definition of “bona fide prospective purchaser” that assures new owners/operators seeking liability protection under Part 201 are unaffiliated with liable, previous owners/operators. Use language consistent with the bona fide prospective purchaser definition under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (see Appendix L).
88. Define nonperformance, especially in terms of “diligent pursuit” and “adequate characterization” (see Appendix M).

89. Consider the enforcement benefits of adopting a rebuttable presumption of liability against historic owners/operators at legacy sites where it can be shown that the contaminants or processes used were the same as those that contributed to the contamination found at the site.

Site Documentation

Documenting the entire universe of sites and liable parties under Part 201 is essential to monitoring and enforcing remedial response and due care obligations. The Liability/Compliance Subgroup makes the following recommendations:

90. Develop ongoing site monitoring and documentation requirements to minimize public health impacts.
91. Based on the Liability/Compliance Subgroup's recommendation to tie liability protection to due care obligations, monitoring should become part of due care. Monitoring should be subject to a timeline and monitoring results could be submitted electronically in order to sort the site information by risk.
92. "Facility" must be defined for purposes of mandatory reporting.
93. To the extent that any permit process is adopted in the future, disclosing site information to the MDEQ should be an essential consideration.

Benchmarking and Reporting

Clear benchmarks for remediation may facilitate self-implemented site remediation under Part 201. Clearer directives to the regulated community are needed to define a liable party's affirmative obligations to diligently pursue remedial response obligations. To address this, the Liability/Compliance Subgroup recommends:

94. Include clear remediation benchmarks in requirements for reporting and disclosure to induce self-implementing compliance. (See Appendix M.)

Any increased reporting requirements may impact the workload at the MDEQ. The subgroup makes the following recommendation:

95. Develop an electronic reporting system for notification of releases and submission of due care plans that may encourage compliance and help minimize workload increases.

Use Restrictions

Land and resource use restrictions must be monitored to ensure their effectiveness in the long term to assure protection of the public health. These restrictions should require periodic reporting and notification to ensure their protectiveness. The subgroup attributed a high level of importance to making parties advocating for risk-based closure aware of the true costs of land use restriction maintenance. The Liability/Compliance Subgroup recommends the following:

96. Land use or activity restrictions must be funded to be fully protective. There must be financial assurance at the time of creating an institutional control (i.e., ordinance) that the control will be monitored over its life and continue to be protective of the public health. Likewise, engineering controls (ECs) must also be maintained and monitored

to ensure protectiveness. Requiring some level of ongoing financial assurance for land use restriction maintenance at the time the measure is approved or implemented is also warranted. The group did not reach consensus on who should bear the long-term costs of land use restrictions.

97. The Liability/Compliance Subgroup endorses the Uniform Environmental Covenants Act (UECA), currently before the Michigan legislature, as a tool to improve public health protection at sites with land and resource use restrictions.

Joint Enforcement

There is no joint policy statement outlining specific instances when the MDEQ and the Michigan Department of Attorney General (MDAG) might use CERCLA authorities to pursue liable parties. The subgroup concluded that one is not expected. The subgroup was specifically asked to consider this issue; however, it has no recommendation at this time.

FINALITY/CERTAINTY

A site cleaned up to the generic criteria for the zoned land use at the time of cleanup should be an end to liability (release) for the party conducting the cleanup. If a developer buys the parcel that has been remediated to generic industrial or commercial standards, intending to develop it in multiple use or as residential, the developer would be responsible for returning the property to a status that meets residential criteria. It is also acknowledged that the most contaminated industrial sites may never reach finality. Defining clear endpoints for risk-based closures are essential. In order to ensure an appropriate balance in risk-sharing between the regulated parties and the public, public health protection must be accomplished to the maximum extent possible. The subgroup has the following recommendations:

98. Historic, liable owners/operators that have conducted a cleanup meeting generic criteria for the zoned land use at the time of cleanup should be released.
99. The release of the owner/operator should have as few conditions as possible and re-openers must be clearly defined.
100. Adopt the Complexity Subgroup's recommendation reducing the number of site categories to simplify the residual risk factors. (See recommendation 63.)
101. Develop incentives for source removal and control to benefit both the public, by protection of public health, and the regulated parties, by encouraging activities that would relieve them of their Part 201 obligations.

Appendix A:

Characteristics of a Successful Cleanup and Redevelopment Program

SUMMARY OF BRAINSTORMING: AUGUST 2005 MEETING OF THE PART 201 ROUNDTABLE

Outcome: A program that protects public health, safety and welfare, and the environment, and encourages appropriate brownfield redevelopment.

- Is credible (has appropriate cleanup criteria and other requirements)
- Is reliable over the long term (including land and resource use restrictions)
- Assigns costs only when that action is visible and costs are quantified and assured
- Protects groundwater resources
- Appropriately considers intergenerational equity
- Is enforceable and enforced
- Has resources to address risks for which there is no liable, viable, willing party

Processes and Standards

- Achievable
- Predictable
- Consistent
- Flexible
- Transparent
- Understandable
- Efficient (minimally iterative with decisions made at lowest appropriate level)
- Performance-based with a minimum of prescriptive requirements
- Affords long-term certainty (about business risk for implementer and about risk to public health, safety, and welfare, and the environment)
- Affords appropriate finality

Roles and Relationships

- Operates with mutual respect among all involved parties
- Provides feedback to preventive programs
- Regulated parties are known to regulatory agency
- Reflects proper role for the MDEQ in regulatory oversight and redevelopment assistance
- Allows timely and effective input from and feedback to all stakeholders
- Is well coordinated among RRD districts, with other MDEQ divisions, state, federal, and local agencies

- Meshes appropriately with regulation at other levels of government on which program depends
- Is operated in concert with federal, state, and local financial incentives and resources
- Ensures effective risk communication and education about risk

Rights and Responsibilities

- Is based on expectation that all parties will comply with obligations
- Allows for appropriate allocation of limited public and private resources
- Program effectiveness is measurable and measured against objective standards
- Legislature provides resources to the MDEQ to carry out assigned roles

Appendix B:

Part 201 Discussion Group Summary—

Recommendations to Subcommittees, and Process Description, January 2006

At the request of the director, the Part 201 Discussion Group has identified the following questions, issues, and concerns regarding the content of the Part 201 program and/or the MDEQ's implementation of it. The Discussion Group has organized the issues, concerns, and questions into the five broad topics described below in order to better define and "frame" the issues/problems. With the exception of Item #5 (Funding), the Group has agreed that identification and evaluation of potential solutions to the problems framed by these topics would be more efficiently addressed by focused subcommittees comprised of stakeholders who have appropriate expertise and who are invested in the aspect of the program addressed by the topic. (The Group has agreed that funding concerns will continue to be addressed by internal MDEQ resources, although it acknowledges that funding issues will likely impinge on the work of all subcommittees.)

Each subcommittee will be asked to focus on developing proposals for program improvement, including both the "what" and "how" of implementation. While the overall issue of stable program funding will be addressed outside the subcommittee process, the subcommittees must be mindful of and specific about the resource implications (for both MDEQ and other affected parties) of any recommendations for change. Subcommittees will also be asked to address in their recommendations the most effective vehicle (legislation, rule, etc.) to accomplish change.

Following the delineation of topics, a proposed outline of the process to be employed for the formation and operation of the subcommittees is provided.

TOPICS

1. **LIABILITY/COMPLIANCE.** *Evaluate causation-based liability scheme in light of the past 10 years of experience and determine what changes, if any, are necessary to enhance pace and number of cleanups while assuring that Part 201's brownfield goals are met.*
 - (a) **BEA/Due Care Process:** *There is a general consensus among Discussion Group members that the BEA and due care processes are not working effectively to achieve the objectives of the 1995 amendments which created these provisions. The BEA process has not been shown to provide a reliable means of distinguishing new releases from those releases existing at the time of property transfer. The BEA process does not account for changes in hazardous substance use over time by an owner/operator, limiting the utility of a BEA performed at the time of acquisition. In general, the Discussion Group questions whether liability relief should have been the paramount goal of the BEA process in any case. There is some indication that the goal of achieving liability relief may overshadow the more important objective of identifying environmental conditions at "facilities" which represent human health and safety risks. These risks must be appropriately managed and controlled in order to enable the safe use or re-use of these*

contaminated sites. Accordingly, this subcommittee should re-invent the BEA process in a manner that would (a) continue to provide liability relief to new (nonresponsible) purchasers and occupants of "facilities," (b) result in the continued identification and disclosure to MDEQ of "regulated sites" under Part 201, and (c) focus pre-acquisition environmental due diligence efforts on the collection of data and information necessary to support the development of appropriate due care plans.

The Discussion Group recommends that the following questions and observations be a starting point for discussion by the subcommittee.

Does the BEA process provide the most technically effective and administratively reliable method for implementing the causation-based liability standard from the perspective of the purchaser? The agency? The commercial lending institutions?

If not, what other options exist that would still maintain the ability of an innocent purchaser to avoid liability for cleanup? Should the resources directed toward pre-acquisition inquiry be focused on identification of due care issues, rather than on distinguishing between existing contamination and new releases? What are the implications on various stakeholders of moving to an alternative approach?

If BEAs are retained in a revised form, should MDEQ continue to have a role in the review and affirmation of BEAs, or does sufficient experience exist within the private sector (lawyers, consultants, etc.) at this point to eliminate the need for determinations?

If the BEA process is eliminated, what type of information should be disclosed to the MDEQ on contaminated sites at the time of a transaction for the purposes of liability protection?

Are the due care obligations imposed on nonliable parties appropriately defined? Do they create a disincentive to brownfield development?

What is the best method to secure performance of due care response activities in the long term?

Will determinations granted historically by MDEQ stand the test of time? If the regulatory approach is altered to eliminate determinations by MDEQ, what is the appropriate and fair method for handling sites that have previously received determinations from the MDEQ?

- (b) **Compliance:** *How can MDEQ improve the overall rate of compliance with Part 201? There is a general consensus among Discussion Group members that rates of compliance with Part 201 are unacceptably low. There is also a general consensus that some regulatory requirements are not sufficiently clear or precise to allow regulated parties to clearly understand their obligations or to allow the department to efficiently enforce those obligations (e.g., the requirement under Section 14(1)(g) to "diligently pursue").*

The Discussion Group recommends that the following questions and observations be a starting point for discussion by the subcommittee.

Evaluate whether compliance can be improved with effective enforcement of affirmative obligations through the aggressive use of existing fines and penalties.

How can the time and resources needed to identify and pursue nonperforming liable parties be reduced?

How can the complexity of implementing response activities at sites where a liable party is not responsible for all contamination be reduced? Should liable parties be afforded the opportunity to be reimbursed for orphan shares through TIF or through use of State funds designated for orphan sites?

What methods exist for documenting for MDEQ the entire universe of sites/liable parties subject to regulation under Part 201 so that it can better monitor/enforce remedial response and due care obligations, such as:

- Mandatory site disclosure requirements

- Site permit/certificate-of-occupancy concept

Can reporting/disclosure methods facilitate monitoring and enforcement of liable party obligations under Part 201 without undermining self-implementing approaches?

Consider providing clearer directives on what constitutes a liable party's affirmative obligations to diligently pursue remedial response obligations.

Evaluate whether land and resource use restrictions are reliable and effective in the long term to assure protectiveness.

Consider the option of MDEQ/DAG jointly issuing a policy statement indicating when, how, and under what specific conditions MDEQ/DAG might use CERCLA authorities to pursue liable parties evading their affirmative obligations under Part 201.

- (c) **Finality/Certainty:** *There is a general consensus among the Discussion Group that the program requires a clearer and more effective balance between finality/certainty and the need to assure the protectiveness of response activity. As the subcommittee considers options for strengthening the MDEQ's "stick" through enhancements in enforcement and mandatory site disclosure (above), it should also consider options for making the "carrot" more compelling to liable parties.*

The Discussion Group recommends that the following questions and observations be a starting point for discussion by the subcommittee.

Finality/certainty is critical to improving the overall rate of compliance with Part 201. Liable parties sometimes avoid or delay execution of obligations because the regulatory process is overly complex and the endpoint is ambiguous. Changes that increase finality/certainty need to reflect the fact that a significant proportion of response activity includes measures that must continue to function to assure that the response activity functions properly and is protective (e.g., operation and maintenance; land and resource use restrictions).

What steps could be taken to clarify and streamline the MDEQ role in the remedial response process that would demonstrate to liable parties that the regulatory process has a definitive end?

When, how, and under what circumstances might the State have a compelling interest to grant a liability release for completed cleanups? Should that release be limited and/or conditional?

An effective cleanup and redevelopment program requires an appropriate balance in risk-sharing between the regulated parties and the public. In light of the many factors that are being balanced (e.g., residual risk associated with some cleanup categories, the sources of uncertainty about the reliability of response activity, the desire of liable parties to fix their long-term costs), what is the most effective way to achieve that balance?

Should the concept of a RAP be eliminated and replaced with something else to better reflect the regulatory end that is being accomplished?

2. **COMPLEXITY.** *There is a general consensus among the Discussion Group that the complexity of the program is a hindrance to timely implementation of appropriate response activity. The subcommittee will be asked to identify sources of technical complexity within the program and recommend changes that serve to simplify and clarify it without inappropriately reducing its flexibility or compromising overall protectiveness.*

The Discussion Group recommends that the following questions and observations be a starting point for discussion by the subcommittee.

- (a) **The sheer number of cleanup criteria, exposure pathways, and other considerations appears to be an impediment to efficient selection and implementation of response activity.**

Can better use be made of provisions that allow for the selection of indicator chemicals for a given facility, increasing the efficiency and effectiveness of response activity?

Should the number of exposure/migration pathways be reduced or, as an alternative, could simple off-ramps be developed that would serve to eliminate pathways earlier in the evaluation process? Would this reduce transaction costs and focus efforts on the pathways that represent risk drivers?

Should the number of land use categories be reduced (e.g., to just residential and nonresidential)? What would be the implications of such a modification on the program?

Should nongeneric cleanup criteria (i.e., facility-specific and/or site-specific criteria) be used more widely? Less often? In either case, how could this be facilitated?

- (b) **What role can and should probabilistic risk assessment play in the cleanup program? How can probabilistic risk assessment methods be better integrated into the program so as to convey the significant uncertainty associated with cleanup criteria and facilitate better risk management decision-making? How could this be implemented? How would probabilistic risk assessment affect the complexity of the program?**

- (c) **The GSI pathway has been identified as a stumbling block for many response activities because it is the pathway that is least amenable to resolution through exposure controls and land and resource use restrictions.**

How can the regulatory framework for this pathway be simplified without compromising protection and consistency with Part 31?

While consistency with the water quality standards and related provision of Part 31 is key, there are contextual differences between that regulatory program and Part 201 that make direct application of some Part 31 procedural requirements difficult. Can and should the interface between the two programs be approached differently?

- (d) **Should Part 201 be amended to incorporate a provision similar to CERCLA's Section 9621(e) that provides the following:**

"No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site, where such remedial action is selected and carried out in compliance with this section."

A provision similar to this CERCLA provision could provide an avenue whereby ARARs could be considered and incorporated into the RAP itself, rather than imposing the need to comply with other regulatory program not designed to accommodate remedial actions (such as NPDES permits, wetland permitting, etc.).

- (e) **How can the ambient and indoor air criteria and their implementation be improved?**

Are the generic criteria developed for these pathways reliable predictors of actual risk?

Can the regulatory framework for these pathways be simplified in a way that reduces transaction costs of liable parties trying to demonstrate compliance without compromising protection?

- (f) **What is the appropriate goal of regulation and guidance? Do existing rules and guidance serve to facilitate or encumber the transactional and remedial response processes?**

The 2002 Administrative Rules were intended to reduce the need for OM guidance. Instead, the rules are so complex that they seem to have necessitated additional guidance.

Can the rules and guidance be significantly altered to simplify compliance efforts and embody the other concepts being discussed in this process?

Is there too much technical detail in the rules, particularly in areas where the science is still evolving?

Should cleanup criteria be included in promulgated rules or is it preferable to have criteria development and updating managed by a process that is more nimble than the rulemaking process (while still assuring openness)?

3. **PROGRAM ADMINISTRATION.** *There is general consensus among Discussion Group members that there is a need to optimize MDEQ administration of the Part 201 program in order to enhance the credibility of the program and achieve program objectives. To that end, the subcommittee should make recommendations to improve internal MDEQ processes and program administration to: (a) increase meaningful risk reduction as measured through redevelopment and/or RAPs/IRDCs/Due Care response activities implemented; and (b) establish effective methods and indicia that can be used to measure and benchmark progress. Since the majority of response activity review and approval is conducted in the RRD, most of the remaining elements under this topic refer to the RRD. The subcommittee should take into account that Part 201 is implemented by a number of divisions and offices within the MDEQ.*

The Discussion Group recommends that the following questions and observations be a starting point for discussion by the subcommittee.

(a) General Internal Processes

Can interactions between RRD and the constituents it regulates be more of a partnership and less adversarial in light of the fact that the parties interacting with RRD include a range from nonliable parties whose primary objective is due care compliance in the context of redevelopment to liable parties who have long histories of noncompliance?

How can RRD establish the most effective balance between regulatory and service-oriented functions?

Evaluate methods, such as training, to reinforce the notion that RRD's function is to work in partnership with the regulated community to increase levels of overall compliance, and emphasize the importance of facilitating brownfield redevelopment

How can the MDEQ better assure that staff members throughout the department recognize the important distinction that exists between liable parties and nonliable parties?

(b) RRD/MDEQ Review Processes

How can initial project scoping meetings be employed to identify major issues early in the process on both remedial and brownfield projects?

What steps could be taken to assure that feedback on plans provided to RRD is as definitive as possible about what a party needs to do to comply with Part 201, both from a remedial perspective as well as a due care perspective?

Review MDEQ/RRD's internal review and decision processes. Evaluate those processes in light of the multiple purposes they serve (e.g., intra- and inter-divisional consistency, compliance with statute and rule, need for clarity in communication to plan submitter) and make recommendations for effectively accomplishing appropriate goals.

There is currently no clear avenue of appeal for a person whose plan is rejected by the RRD. What appeal or dispute resolution process is appropriate, and how can it function, recognizing that certain submittals are covered by unilateral or consent agreements or other enforceable agreements that may, by their nature or content, limit or define appeals and dispute resolution? This

evaluation should address the types of decisions that may be subject to dispute, and whether different processes are appropriate depending on the nature of the dispute.

(c) Measurement/Benchmarking:

What indicia/characteristics should be measured and used to assure that Part 201 is meeting its risk reduction goals? (Progress should be measured in terms of meaningful risk reduction, not via pushing of paper documentation.)

How can benchmarks be developed and implemented to hold both regulated parties and the MDEQ accountable for meeting objectives?

4. **BROWNFIELD.** *Discussion Group members agree that brownfield redevelopment is a critical component of the Part 201 program. Many of the elements to be addressed in the other topic subcommittees are clearly relevant to improving the effectiveness and efficiency of redevelopment. However, there are a number of other issues that deserve special focus. In light of the experience gained to date, the subcommittee will be asked to make recommendations about steps that can be taken to enhance, promote, facilitate, and streamline brownfield redevelopment in Michigan.*

The Discussion Group recommends that the following questions and observations be a starting point for discussion by the subcommittee.

How can MDEQ divisions work more effectively in partnership with each other as well as with other State agencies (MEDC, Treasury, MDOT, MSHDA, etc.) to facilitate brownfield redevelopment? Value Stream Mapping could be a useful tool in documenting the current Michigan brownfield incentives process and identifying opportunities for significant streamlining and coordination.

Utilizing Michigan's brownfield redevelopment incentives requires "packaging" the project in several different formats, such as the SBT NOI, Brownfield Grant/Loan applications, SBT pre-application form, Brownfield Plans, 381 Work Plans, etc. Each program has its own forms, formats, processes, etc., for State agencies to review a brownfield project. This increases the transaction costs for brownfield redevelopment, and also results in some inconsistent decision-making among and between State agencies. Is there an opportunity here to create a single, unified format for transmittal of brownfield project information that can accommodate every program/agency's needs?

How can all involved parties respond appropriately to the time-sensitive nature of brownfield projects?

How can brownfield staff training and support be increased to afford priority to redevelopment projects? (See Funding section below.)

Consider establishment of a team of brownfield facilitators within MDEQ who would be assigned to shepherd sites with a redevelopment plan through the entire regulatory process (including RAPs, grant/loan projects, State-managed projects, and Act 381 projects) and to serve as a liaison with other divisions of the MDEQ and/or other agencies within state government as necessary to see the project through to completion.

To what degree can/should the definition of eligible activities under Act 381 and other financial incentive programs be broadened to make the programs collectively more effective (i.e., demolition activities, etc.)?

Current requirements for work plan approvals under Act 381 and Brownfield Grant/Loan projects are seen by some as too cumbersome. Work plan approvals are currently required to be phased into small tasks, thereby increasing administration and transaction costs for the program. Can this process be improved? Is it appropriate to pursue changes in law to permit fewer and more comprehensive work plans covering a broad spectrum of activities to be submitted for approval?

5. **FUNDING.** *Identify, evaluate viability, and prioritize potential new sources of funds. Evaluate existing level of program funding, including staffing costs and funds allocated for MDEQ-managed cleanups. Determine whether current spending is optimized and aligned with priorities.*

The Discussion Group recommends that the following questions and observations be considered by the MDEQ in formulating its proposals for stable funding.

Flat-rate user fees or fee-for-service arrangements to parties seeking RRD review/approval of work plans, RAPs/IRDCs?

Charge developers flat rates user fees, fee-for-services, or other such mechanisms to support MDEQ technical support on brownfield sites. How can the impact of such fees be mitigated so as not to impede development? Can/should these fees be eligible expenses for reimbursement via TIF?

Evaluate options to assure that they are viable, given the current economic/political climate in Michigan.

Determine where cuts can be made that will have the least impact on the integrity of the program should it become apparent that some level of budget reduction is inevitable.

PROCESS

The Part 201 Discussion Group has identified the following process for formation and operation of subcommittees.

1. *Four subcommittees will be formed. They will be organized around the following topics:*
 - A. *Liability*
 - B. *Complexity/technical requirements*
 - C. *Program administration*
 - D. *Brownfield redevelopment*

The fifth topic identified by the Group, Funding, will be addressed by internal MDEQ resources, although the Group acknowledges that it will be important for work on funding issues to both inform, and be informed by, the work of all subcommittees.

2. *The subcommittees may consider any and all realistic options for addressing the questions, concerns, or issues addressed under their topic—whether they involve statutory amendments, regulatory modifications, or adjustments in program administration/implementation.*
3. *Subcommittees will be of a size and composition that will maximize efficiency, productivity, and assure that recommendations are definitive, concrete, and practical. Although the size of the group may vary by topic, it is generally agreed that the groups should not exceed 8-12 persons.*

Rather than identifying individuals to participate on the subcommittees, the Discussion Group has elected to identify stakeholder groups from which individual representatives can be put forward.

4. *Professional facilitators (neutral parties, not MDEQ) will be retained to manage the four subcommittees. Members of the Part 201 Discussion Group may also elect to participate in one or more of the subcommittees. Part 201 Discussion Group members and the subcommittee facilitators will be responsible for assuring that goals are met, that continuity with the larger mission is assured, and that communication and interaction among the subcommittees occurs.*
5. *The meetings of the subcommittees will be open to all interested stakeholders to facilitate broad input on deliberations with the hope and expectation that such input will improve recommendations and garner support for subsequent reform proposals. Subcommittee meetings will be conducted to allow for specific opportunities for input from stakeholders who are not subcommittee members (e.g., public comment periods at the beginning and/or end of each meeting).*

Appendix C:

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Appendix D:

Michigan Department of Environmental Quality

List of Issues for Part 201

INTRODUCTION

Michigan's industrial history has left a legacy of contamination in soils, groundwater, and river and lake sediments. This legacy continues to affect Michigan's quality of life through impacts on human health, safety and welfare; property values and redevelopment potential; and impairment of public trust resources, including drinking water and productive land. Michigan was one of the first states to recognize and address the need for state-funded response activity and many successes have been realized. Michigan has provided public funding to address immediate public health, safety, and environmental threats at thousands of sites. State funding has also readied hundreds of sites for redevelopment through grants and loans to local government, plus projects undertaken directly by the MDEQ. Private interests have invested aggressively in redevelopment in Michigan, helped by causation-based liability provisions that are unique among the states, and by land use based cleanup options that allow cleanup objectives to be matched with the planned development. Liable parties are able to avail themselves of a broad range of options to establish compliance with cleanup requirements. Michigan's cleanup and redevelopment program is nationally recognized for its innovative features.

In spite of those successes, the MDEQ estimates that there are still tens of thousands of contaminated sites in Michigan that have not been inadequately addressed. The causation liability scheme for owners and operators has done much to facilitate redevelopment but it has also complicated efforts to secure prompt and appropriate response actions from liable parties. For example, properties that change hands many times while there is continuing hazardous substance use, making it difficult to establish the proofs required to support action against liable owner/operators. Specific affirmative obligations and broad freedom for liable owners and operators to conduct cleanups without state involvement or approval were intended to maximize the rate of cleanups achieved after the 1995 amendments to Part 201. The reporting provisions of Part 201 give the MDEQ extremely limited information on which to judge rates of compliance for liable parties (for their remedial obligations) and for all owners and operators of contaminated property (for their "due care" obligations). However, anecdotal observations lead the MDEQ to conclude that parties are not taking action to address conditions for which they are liable in a timely manner. Further, the level of knowledge about and compliance with the more limited "due care" obligations, which apply to any person who knows his or her property is contaminated, also appears to be inadequate.

Program implementation challenges include a declining budget for the program, and new scientific evidence supporting the need for changes in exposure pathway considerations to adequately protect public health, safety, welfare and the environment. These things exacerbate the challenges of the program to ensure timely site clean up and adequate management of health, safety, and environmental risks. In addition, the flexibility provided by land use based categories of cleanup, including numerous options to control

exposures to contamination left in place, has resulted in liable parties pursuing remedial strategies that do not remove contamination sources. It appears that liable parties do not recognize (or are not motivated to consider) that the costs of continued monitoring and maintenance of such controls will often exceed the costs of more active contaminant removal in the long term. In addition, leaving contamination on site undermines the ability of liable parties to achieve closure finality. The tension between regulatory finality and on-going risk management obligations is a major issue that appears to delay liable party actions.

The quality of information collected and presented to the agency is a continuing impediment to timely cleanup of contaminated sites. It seems reasonable to conclude that the documentation of response actions that are never reviewed by the MDEQ is equally incomplete and inaccurate. It is often the case that appropriate remedy selection and risk management decisions cannot be supported by site characterization information provided to MDEQ. Some examples of these problems raise fundamental questions: exposure pathway evaluations are incomplete; acute hazards are not recognized and addressed; reports depict incorrect groundwater flow direction based on data submitted; monitoring wells are not installed at proper locations or screened at proper depths to adequately a contamination plume; applicable or relevant and appropriate regulatory requirements are not properly identified. It is critical that program requirements are clear and complete enough to minimize these kinds of errors.

The cleanup and redevelopment program needs a different balance of incentives and disincentives to assure high rates of compliance, timely cleanups, and appropriate brownfield redevelopment.

The following sections outline issues that MDEQ staff has identified as being necessary to address in order to make the cleanup and redevelopment program optimally effective. For each subject group, questions include both broad issues and details that have substantial impact on program functions.

LIABILITY/COMPLIANCE

- How does the causation standard affect the timeliness of cleanups and management of risks at facilities?
- Would changes to the causation standard, or in obligations imposed on liable parties, enhance the pace and number of cleanups?

- Identification of facilities (reporting/disclosure)

- Identification of liable parties

- Clarification of liable party affirmative obligations

- Source control

- Site characterization

- Interim actions

- Additional response activities

- Fixed time periods for completion of liable party obligations

- Is the BEA process an effective and reliable means to distinguish new releases from existing contamination in the context of property transfers?
 - What other processes could more effectively and reliably provide liability relief to nonresponsible purchasers and occupants of “facilities?”
 - What other processes could result in identification and disclosure to MDEQ of “facilities,” either in relation to property transactions or more generally?
 - What process changes could focus pre-acquisition environmental inquiry on the collection of information necessary to identify and implement appropriate “due care” actions?
- What “due care” process improvements can be made to ensure that facilities are used in a manner that is protective? (Including long-term ownership, not triggered by property transactions.)
- Should the statute of limitations provisions in Part 201 be modified? Recent court decisions will significantly limit both state and private party cost recovery actions. These decisions are a major disincentive to parties who would otherwise take actions with an expectation that they can recover costs from liable parties. They also make it difficult for the State to assure that the public does not inappropriately bear remedial costs that should be paid by liable parties. The state’s ability to use liens is also hampered by recent court decisions, making it more difficult for the MDEQ to respond to its mandate to recover costs from liable parties.
- Do the defenses/exemptions in Sections 20126(3) and (4) function appropriately under a causation scheme? They were designed to work with a strict liability scheme – once a person loses a defense, it is arguably unclear if they are strictly liable or liable for only that contamination they caused. Often there will not be information available to define the scope of liability when a defense is lost.
- Do the divisibility of harm and apportionment of liability provisions require clarification in relation to the causation standard for owners/operators? These provisions were also designed to work with a strict liability scheme. Implementation issues are similar to those described in the previous item.
- Is Section 20142 effective? Should it be changed? Current language is potentially difficult for regulated parties to understand in relation to owner obligations to address storm water discharges that contact waste material, Part 31 obligations that arise from owner/operator changes in facility conditions, etc.
- How can Section 20114 be changed to logically apply under a causation liability scheme? It was largely developed under the strict liability scheme and needs to be modified to clarify which obligations apply to current owners and which apply to liable former owners.
- Is it appropriate to retain the exemption in Section 20107a(4) from “due care” for a person whose property is affected by migrating contamination? Are other “due care” exemptions appropriate?
- Is there a workable remedy for failure of local ordinances or other institutional controls? This approach to remediation is not directly controllable by the party whose remedy depends on the institutional control. There may be a long gap between the time the remedy is implemented and the failure or termination of the institutional

control, making it exceptionally complex to modify the remedy to address the resulting problems. Typical financial assurance mechanisms are not well suited to this situation. There may be a need for financial assurance or risk pool contributions for parties who rely on institutional controls.

- Does the current land use based approach to cleanup adequately reflect the public interest in land use flexibility? Is there an appropriate connection to local land use planning processes? Under the current program, existing zoning and land owner preferences are the only relevant considerations. This does not account for local plans to evolve land use over time.
- How can the current system of land use based cleanup be modified to allow for efficient and protective transitions in land use? The current system does not readily allow a remedy to be modified by a subsequent land owner/user without altering or confusing the obligations of the party who did the initial cleanup. The system needs to be able to deal with “second generation” land use while assuring protectiveness.
- Exceptions from definition of “release” do not carry over to the definition of “facility,” making it difficult to interpret applicability of Part 201 to historic agricultural chemical use (e.g., arsenical pesticides), vehicle exhaust, etc. In effect, the definition of “facility” can be read to render moot the exceptions from “release” because the phrase “otherwise comes to be located” trumps the “release” exceptions. Current RRD policy may inappropriately limit applicability of Section 20107a in cases where “release” exceptions apply.
- Is it possible and/or appropriate to better align Part 201 and Part 115 with regard to relocation of solid waste? This is especially important for redevelopment projects that involve relocation of, or construction on, solid waste.
- On a related note, there appears to be virtually no compliance with the notice provisions of Section 20120c for soil relocation. This section was created to compensate when simplifying assumptions in the pre-1995 rules were eliminated but has not functioned as intended. Section 20120c and the implementing rule, R299.5542, are complex and ineffective. There may be a need to coordinate Part 201 changes with recommendations of the EAC regarding inertness and land application.
- How can documentation of compliance by owners/occupants with land and resource use restrictions be better tracked and enforced? Documentation is provided in only a small number of cases. MDEQ has anecdotal evidence that restrictions are not being complied with in a significant number of cases. Continuing to rely on the current risk management system without a demonstration that the restrictions are reliable is inappropriate. Virtually no MDEQ resources are devoted to this work.
- Since Section 20126(7)—related to a lender’s ability to transfer ownership of property to the state—is not functional as written, should it be deleted? Or should other laws be modified to make this provision functional?
- Section 20129(6) has been widely regarded as an interesting idea, but not an enforceable provision. Federal CERCLA case law relating to contribution protection may cast more doubt on this provision. Should it be modified or deleted? Should compliance with Section 7a be a shield to CERCLA claims?
- Should Section 20115a, which allows an owner/operator to elect to conduct leaking underground storage tank cleanup actions under Part 201, be modified so that it is not

a “safe harbor” for a person who has neglected compliance obligations under Part 213? Should MDEQ approval be required for a person who elects to proceed under Part 201 and/or Part 213? Should current compliance with Part 213 and/or Part 211 be a condition for opting to proceed under Part 201?

COMPLEXITY

- What improvements can be made in the current land use based approach to cleanup standards so that a greater number of timely, protective cleanups will result?
- Would simplification of the current land use based cleanup categories reduce complexity without inappropriately compromising flexibility and protection of public health, safety, welfare, and the environment? For example, options for simplified land use categories could be “closed” and “restricted” *or* “residential” and “restricted nonresidential.”

Are there ways to simplify the current risk, conditions and pathway analyses that address the reasonable and relevant exposures without compromising protectiveness?

- What can be done to ensure that sufficient and timely site characterization information is available to support sound risk-based decisions?
- Is there agreement that the program should include a requirement for immediate, aggressive action to address new releases such that impacts are minimized to the greatest practical degree?
- What can be done to require an appropriate evaluation of long term costs of allowing contamination to remain in place versus the capital costs for active remediation?
- There is no motivation for consultant to encourage clients to pursue simpler, more complete cleanup because the consultant typically makes less money from such projects. Requiring documentation of true cost over time of risk management-based remedies is a strategy to change this thought process.
- Does the current land use based approach to remedy selection adequately reflect the public interest in land use flexibility, the relationship of local land use planning with Part 201 land and resource use restrictions, and other land use questions? Under the current system, the current land owner’s wishes and current zoning are the only relevant consideration. Is this prudent?
- Are there alternatives to the current system of land and resource use restrictions that can ensure remedies remain reliable and effective in the long-term to assure protectiveness?
- How will any proposed changes affect program compliance, property transactions, brownfield redevelopment and program administration?

PROGRAM ADMINISTRATION

- Are changes necessary in program administration and internal MDEQ processes to ensure effective delivery of program services?

What are the critical program services? What are the desirable program services? (e.g., training, compliance assistance, enforcement, searchable public databases)

What changes can be made to improve both internal and external communication capability of Remediation and Redevelopment Division (RRD)?

- How should progress be measured and communicated to the public? Are the current statutory reporting requirements relevant and useful? (e.g., Section 20112a, Section 20105(1)(g) and (h))
 - What tracking mechanisms are in place? What additional tracking mechanisms should be considered?
 - What information is monitored, how frequently?
 - What information is shared with the public?
 - What should the program benchmarks and metrics be?
- How can the requirements of Section 20114(8), which are not optimal for either MDEQ or the person submitting a plan, be improved?
- Current Site List provisions in Section 20105 were developed before the internet was a useful information management tool.
 - How can Site List procedures be revised to reflect current technology?
 - Is there a reason to maintain the concept of “site” (i.e., “site” is relevant only in relation to the list/inventory)? Should “facility” be the only term of regulatory significance?
 - Requirements for site listing notice to property owners should be clarified (e.g., who to notify when site name is “Res Wells West Avenue” and 600 properties are affected, none of which is the source property?)
- Site scores were, prior to 1995, required by law to be considered in assigning priority for public funds. There is currently no requirement for site scores to be used in any decision-making or prioritization process.
 - Should resources be used to apply a complex scoring system?
 - Is a scoring system still a relevant idea?
 - Is a comprehensive site inventory and status reporting system more important?
- Is public participation in the remedy selection process effective? How can it be improved?
- Are guidance materials effective; readily available; and responsive to staff, regulated community and consultants’ needs? Are they in the most effective form? Does the RRD use the most effective delivery mechanisms? What are the most effective ways for RRD to secure input when developing guidance?
- Are property owners properly informed of the impacts of land and resource use restrictions that will affect their property rights and property values?
- To improve efficiency and assure fairness, should there be a schedule of fees established to clarify the compensation required to be paid for certain kinds of land or resource use restrictions?

BROWNFIELDS

- Are the existing brownfield development tools, including the 1995 amendments to Part 201 achieving the desired outcomes?
- Do we need more or different redevelopment tools (not necessarily administered by MDEQ)? What resources would be required to support any new tools?
- How can coordination be improved among MDEQ divisions and other state agencies?
 - What improvements to process are necessary to allow all involved parties to respond appropriately to the time-sensitive nature of brownfield projects?
- Is it possible to use a unified format for transmittal of Brownfield Project information?
- Is it possible to enhance Act 381 and other financial incentive programs?
 - Is it appropriate to broaden the definition of “eligible facilities?”
 - What improvements can be made in the work plan review process?
 - In light of the findings that MDEQ is required to make when responding to an Act 381 work plan, how can the review process be adapted to the very limited amount of information that is often available when work plans are first submitted (i.e., how can a phased review/approval process be improved)?

Appendix E:

Draft Recommendation to Increase Rate of Part 201 Response Actions and Cleanups and Reduce Requirements for MDEQ Pre-Approvals

ISSUE

Pre-approval by the MDEQ as required by various Parts of Act 451 (31, 55, 201, 301, 303, etc.) for various response actions imposes additional time and costs which slow the rate and magnitude of cleanups being achieved.

Locations with Part 201 obligations are places where an environmental injury/impairment exists due to the release of a hazardous substance.

Various cleanup actions that remove or destroy/contain the released hazardous substances are the primary Part 201 “response actions” by which these injuries are repaired.

Other response actions, such as property or resource use limitations, are sometimes the means by which certain conditions are addressed to “complete” cleanups to a state standard.

Various provisions of Act 451 and interpretations require parties willing and interested in conducting certain response actions to secure approval from with the MDEQ in order to have the authority to implement the action (in-situ groundwater treatment, contaminant removal in or by streams and wetlands, etc.).

MDEQ “approvals” of proposed actions may take many forms (permits, RAP approvals, etc.) and reflect the state reaching a conclusion that the action will not have an adverse environmental consequence. Before issuing such approvals, demonstration that no adverse environmental consequences will result is often required. The MDEQ approval may also reflect an agreement by the state that further actions would not be required. Approvals of this type have to be issued with even a greater degree of certainty and demonstration not just that the action will not be harmful, but that it is sufficiently comprehensive and conclusive in its endpoint.

Parties willing to undertake response actions have the ability (through competent technical evaluation) to reach conclusions as to whether a proposed activity to abate an identified harm/injury will result in another environmental injury/harm. Many such parties face this type of business risk decision making daily and are willing to proceed to accomplish a known good outcome (such as cleanup) when the risks of adverse alternate outcomes are low (not necessarily absent a risk, as often is the certainty MDEQ has to require).

Securing MDEQ approvals requires additional time prior to cleanup actions being implemented, and can require considerable additional technical evaluation and documentation that adds to the cost of the cleanup action (leading some to conclude cleanup is too costly to implement).

Resources available to the MDEQ to engage with interested parties are limited and projected to become more limited in the future. Therefore, the opportunities to secure MDEQ approvals in a timely and effective manner are expected to diminish in the future, further slowing the implementation of cleanup actions.

SUGGESTION

Significantly reduce the number of circumstances in which MDEQ approval relative to Part 201 response actions is required before the activity can be implemented.

Eliminating requirements for MDEQ approvals (probably by amendment to Act 451) should be done in a manner that does not relieve a party from liability should their action result in other environmental damage.

Actions exempt from pre-approval by the MDEQ may be specified types of activities, or activities below some threshold of magnitude.

Notifying the state of the activity, rather than requiring pre-approval by the MDEQ may be appropriate.

A mechanism (such as a voluntary permit for a given fee) may be desired by which parties can secure pre-approval for certain circumstances.

RESULT

The primary result of implementing this suggestion is expected to be the performance of more Part 201 cleanups and response actions.

More known conditions of environmental harm will be corrected.

There may be some additional degree of uncertainty as to whether another environmental harm will have occurred or is likely to occur as a result of the Part 201 action, but the responsibility for decision making as to the risks and benefits of the action will have been shifted to the implementing party from the state (without the state giving up any rights).

In addition to more Part 201 cleanup/response actions being implemented, the MDEQ will benefit by:

- Not needing to engage in pre-project evaluation and decision making for as many projects as is currently required, thereby allowing more resources to be targeted to auditing and directing performance at high risk cases
- Receiving more information about cleanup/response actions (if notification in lieu of approvals is implemented)

RECOMMENDATION

Details for implementing this suggestion should be developed and pursued by involved stakeholders.

Appendix F:

Conceptual Framework for Changing to an Environmental Cleanup Permit Program

OVERVIEW

- Retain liability standard
- Retain ordinary transaction due diligence standards
- Require permits as controlling documents
- Permits replace Baseline Environmental Assessment (BEAs) and due care plans, and portions of Remedial Action Plans (RAPs), interim response, and Interim Response Designed to meet Criterion (IRDC) plan components.
- Permits contain Operation and Maintenance (O&M) requirements
- Permit requirements replace institutional control requirements for property covered by permit.
- Permit identifies the relevant criteria and performance standards.
- Five year renewable permits
- Permits can be transferable.
- Two types of permits: Remediation Permit (RP) and Use/Occupancy Permit (UOP). Remediation Permits are for cleanups. Use/Occupancy Permits cover due care and use restrictions. Use includes owning fee or land contract interest.
- Allow general permits/certificate of coverage methodology for appropriate recurring situations. (such as small spill cleanups)
- Enforcement
- Civil Penalty for failure to get permit/permit violations
- Cost recovery still available against liable parties
- Any interests in property that are not “use or occupancy” would **not** require a permit... eliminates “lender” liability. Upon foreclosure, a lender would have to obtain an assignment of existing permit or get its own permit related to use upon foreclosure.
- Provides more compatible framework for working with requirements from air/water permit programs.
- Emphasis on performance instead of plans

LIABILITY SCHEME

Liable Parties: The liability of a person can still be determined in the same way as current law (responsible for an activity causing a release). Liable parties are liable: (1) for response activity costs incurred by the state or any other person; and (2) for obtaining a remediation permit. Failure to apply for a remediation permit (RP) would subject the liable party to fines or penalties. Compliance with an RP would bar cost-recovery and would shield against civil fines and penalties.

Nonliable Parties: A use/occupancy permit (UOP) will generally be required of any nonexempt person who uses or occupies a “facility” (except possibly in the case of migrating groundwater). Use or occupancy will need to be defined, but the intent is that every tenant or owner of a facility should be covered by a UOP. Failure to apply for a UOP would subject the person to fines and penalties. A UOP can include additional response activities if the permittee wishes to eliminate some permit conditions pertaining to use. Compliance with a UOP would be a shield against civil fines and penalties. Some consideration should be given as to whether to require a UOP in situations where the only issue is the migration of contaminated groundwater. Currently, persons in that position are not liable for response costs nor for due care [26(4)(c)] Because of the property rights at issue, it is probably better to make a UOP optional in that case. Possible exemptions to the UOP requirement include residential users (similar to 26(3)(f) and owners of certain types of easements (for transportation, etc.).

Cost Recovery: “Response activity” needs to be redefined so as to be limited to response activities done pursuant to permit. After these changes come into effect, response activities that are not done pursuant to a permit are not recoverable under the statute.

Grandfather: A transition must be made to the new program. Permits should be required within a specified time frame (perhaps one year) for any ongoing response activities except for those that meet the current definition of “complete” before the permit requirement kicks in. An exception might be needed for response activities that are governed by consent judgments or that are otherwise under court supervision.

Due diligence: The liability structure regarding innocent purchasers and due diligence should remain. A person who does the appropriate environmental due diligence under the current standards, and who is an innocent purchaser, would not be subject to fines or penalties for failure to get a UOP. However, if it is subsequently determined that the property is a facility, the permit requirement would kick in at that time. The existing due diligence scheme should also conform to the **Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)** “all appropriate inquiry” so that “one size fits all” for transaction screening studies. If due diligence shows the property is a facility, the person will be subject to the UOP requirements (including fines and penalties for failure to get a UOP).

Notice on Transfer: Permits (and statute) can include a provision that any permittee provide notice and a copy of permit to transferee. A UOP should be transferable with an affidavit that uses will be consistent.

PERMIT APPLICATION

The information required in the application should be sufficient to establish general and specific permit conditions. The level of information and detail required will be different for each type of permit.

Remediation Permit (RP) Application

- Five-year renewable permit
- Required for all liable parties; optional for any one else

- Identify list of contaminants of concern (anything above generic residential criteria). Certify that at time of application, no other known contaminants are present.
- Identify type of land-use, and conditions needed to protect users. Permit must be consistent with current land use.
- Identify relevant exposure pathways.
- Identify any other permits already in place for the facility.
- Identify any interim response issues known at time of application (abandoned drums, imminent hazards, fire or explosion hazards)
- Include any reports or data available regarding contamination.
- Propose a conceptual response plan (so appropriate permit conditions can be drafted). For example, pump and treat plus containment for groundwater, capping, etc. Note: The idea is to have enough information to draft conditions that must be met in the permit, not to “approve” the selection of an approach

PERMIT CONTENT

Emergency Response Permit (ERP)

- Special, limited permit intended to allow streamlined or general permit for immediately addressing emergency situations, such as spill response, fire or explosion hazards, or immediate dangers.
- Should be a general permit that can be obtained through a certificate of coverage.
- Should be able to file certificate of coverage **after** taking actions as allowed under general permit (can have a required time frame).
- General conditions: Allow taking of appropriate actions to eliminate or mitigate threat.
- Does not substitute for or eliminate need for RP or UOP.

Remediation Permit

- List of chemicals of concern and applicable criteria for the facility
- Obligation to implement conditions and requirements of the permit to meet applicable criteria.
- For soils, performance standards should be elimination of pathway or attaining criteria by removal, treatment in place, or barriers.
- For groundwater, performance standards can be halting migration and/or meeting criteria through pump and treat, in place treatment, attenuation, or barriers and use restrictions. Impacted water supplies must be replaced by permittee.
- Deadlines to demonstrate through an approved performance monitoring plan that the applicable criteria are met. This deadline can be amended if during the permit term a different deadline is proposed and accepted by the MDEQ. Deadlines should be established like Best Available Technology (BAT) based on professional judgment of how long it should take based on the identified conditions. For example, short deadlines may be appropriate for capping a soils only problem or where a remedy is

going to rely primarily on observance of permit conditions related to use of property. Long deadlines may be appropriate for groundwater remedies.

- Compliance is measured by:
 - Timely submittal of deliverables.
 - Completion of response activities on schedule identified in the permit or approved deliverable
 - Attaining criteria as listed in the front of the permit and as shown in performance monitoring report(s)
- Interim response assessment/implementation schedule (if needed)
 - If assessment is needed, require assessment and report within ____ days.
 - Require construction of appropriate interim response measures (as per Rule 526(2)) within ____ days.
 - Require interim response implementation report within ____ days.
- Response activities permitted: The permit should contain conditions (can be general) that permits response activities at the facility intended to meet criteria identified in the first part of the permit.
- Performance monitoring report (PMR): This is the report that should show the identified criteria have been met, along with any applicable permit conditions regarding use restrictions etc. A PMR that demonstrates that generic residential criteria are met can terminate a permit and the need for anyone else to get or hold one. Otherwise, even if no active remediation is required, a permit will be needed to require the conditions related to use and operation and maintenance be observed. After the PMR, it may only be necessary to file response activity reports if remedy is in the O&M plus use restrictions phase.
- Response activity report (RAR): Like PMRs, Periodic (i.e. quarterly) report of response activities taken to meet criteria and permit conditions. Note that a response activity report should be required to be submitted by the person performing response activities, and a certification for whom the response activities were performed. The report would include: new response activities undertaken (if any), monitoring results, new data, and/or operation and maintenance activities, inspection reports, etc.

User/Occupancy Permit

- Identify contaminants of concern and applicable criteria.
- Set forth the conditions for meeting due care obligations. Removing drums, closing underground storage tanks (USTs), installing barriers, prohibiting or restricting use of groundwater, and general description of allowed (or prohibited) uses consistent with due care.
- Notification of off-site migration (as per rule) to be provided by licensee to the MDEQ.
- Response activity report (RAR): Documents monitoring and maintenance of permitted due care activities (inspection reports, etc.).

- Additional response activities: Licensee can apply for additional response activities if desired, either with initial application or as an amendment. Additional response activities may lead to the addition to the permit of a PMR.

SPECIAL SITUATIONS

What should happen if more than one party is liable?

Permits are required for each party. If one liable party has already obtained a permit, the same permit should be issued to each other liable party that applies. The requirements of the permit are enforceable against each liable party. A liable party that does not perform the permitted response activities is : (1) liable for cost recovery from the party that did perform the activities, and (2) subject to fines, penalties, and enforcement from the MDEQ for failure to meet permit requirements. The RAR should make it clear which liable parties have done the work

In order to handle multiparty sites and disputes, the following process could be followed:

- If only one liable party applies for a permit, that liable party gets cost recovery against other nonparticipating liable parties, and a judicial claim for fines and civil penalties against them.
- If more than one liable party applies for a permit for the same facility, then the permit issued to each should be the same, with a default provision in each permit that specifies a proposed cost allocation (per capita). This allocation can be reviewed and adjusted in a contested case proceeding. The final allocation can be used to adjust past costs in a settlement or if needed, after judicial action on a cost recovery claim.
- Permit conditions are jointly and severally enforceable against any liable party permittees without regard to the proposed allocation.
- There should be a general permit and buy-out provision for *de minimis* liable parties. Once a *de minimis* party has “bought out” of a site, the general permit and *de minimis* buyout provisions should immunize that party from cost recovery or further action regarding that site. The general permit would continue until the site was cleaned up.

What should happen if the liable party is not the owner, or is not the only owner or occupant of a facility?

A facility can have both a UOP (for nonliable parties) and a RP (for liable parties). A UOP will include general provisions that require access be provided to the MDEQ or an RP to perform response activities under an RP. An RP will include general provisions that protect the property rights of persons using/occupying the property. Conflicts should not be significant unless there is a change in use. In this case, there are two solutions. One is that whoever obtains the first permit obtains the right to continue a permit consistent with that use. So, if an RP is established for a facility, which is then sold/occupied by another, that person’s UOP will identify the prior RP and use restrictions as applicable.

What should happen for off-site contamination?

The RP should cover the entire facility, regardless of property lines. Every parcel within the facility will need a UOP unless an exemption applies.

Is there still a role for institutional controls?

Probably. Institutional controls, especially ordinances, may be needed to cover facilities that are exempt from the permit requirements.

REVIEW

- Permits would be reviewed under Administrative Procedures Act (APA) contested case procedures.
- Court action could be sought to enforce obligation to obtain permit or for fines or civil penalties.
- Court action available for cost recovery claims.

PUBLIC INVOLVEMENT

- An RP should have a similar comment procedure as a draft NPDES permit.
- A UOP should not need public involvement.

ENFORCEMENT

Fines and penalties should be different for RPs and UOPs. Fines should be stiff for RPs to induce liable parties to apply for one. Fines for UOPs should be large enough to induce compliance, but not so large as to be punitive.

Appendix G:

Suggested Metrics to Measure, Improve, and Report Performance of Part 201 Program

The Administration Subgroup recommends the following information be considered by a future stakeholder group to measure, track, and report on the performance of the Part 201 program.

BASIC INFORMATION USEFUL FOR ALL PURPOSES

- State expenditures required to perform and/or achieve all metrics, including location and task-specific costs and program and/or MDEQ operational unit costs
- Annual rate of identification of new locations subject to Part 201
- Annual rate of locations subject to Part 201 being fully resolved (closed locations)

MEASURING MDEQ EFFICIENCIES AND OUTPUTS

- Annual rate of Remedial Investigation (RI), Feasibility Study (FS), Interim Response Designed to meet Criterion (IRDC), Remedial Action Plan (RAP), and Compliance Monitoring Plan (CMP) reports being: (a) submitted, (b) approved, (c) denied with comment, and (d) completed
- Annual rate of Baseline Environmental Assessments (BEAs) and due care plans being submitted for disclosure and determination, and the number of determinations being granted and denied, both upon initial submittal as well as resubmitted following MDEQ comments
- Annual rate of field review of Part 201 compliance (especially Section 20107a compliance in response to notices of off-site migration and other inputs) and results of review in terms on-site property compliance and off-site follow-up response actions being implemented (by the state or other parties)

UNDERSTANDING PROGRAM OUTCOMES AND RESULTS

- Amount of hazardous substance annually removed from the environment
- Amount of hazardous substance exposures annually prevented
- Amount of resource quality restored
- Amount of property restored to productive use (and/or abandonment from use avoided)

TRACKING OUTPUTS/REPORTING

Using the information collected from tracking the above metrics, an annual report should be produced and made publicly available in electronic format containing, at the least, the following:

- Program costs per unit of hazardous substance removal, unit of exposure prevented, unit of resource quality restored, and unit of land restored to use
- Trends and progress over time

Appendix H:

Part 201 Project Checklist

PART 201 PROJECT CHECKLIST

PART I: SITE INTAKE FORM

Site or Facility Name: _____

A. Location & Use

Address of Site:	County:	
Name of Current Property Owner (if different from party proposing response actions):		
Contact Person:		
Address:	Phone/Fax/Email:	
Current Zoning:	Current Use(s):	Previous Use(s):
Proposes Future Use(s) (if applicable):		
Anticipated Future Zoning (if applicable):		
Located in a Wellhead Protection Zone? <input type="checkbox"/> Yes <input type="checkbox"/> No		
<u>Due Care:</u>		
Due care plan or compliance analysis completed: <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Uncertain		

B. Party Proposing or Completing Response Actions

Name of Proponent:	Contact Person:
Address of Proponent:	Phone/Fax/Email:
Liable under Section 20126?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Uncertain
Liable under Section 20114?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Uncertain
If liable, basis of liability	<input type="checkbox"/> Owner/Operator (Describe: _____)
asserted by party proposing	<input type="checkbox"/> Arranger <input type="checkbox"/> Transporter
or completing response	<input type="checkbox"/> Failure to conduct & disclose a BEA
actions:	<input type="checkbox"/> Estate
	<input type="checkbox"/> Otherwise responsible for activity causing a release
	(Describe: _____)
If party proposing or completing response action asserts they are not liable or uncertain, briefly describe the basis for not being liable:	
<input type="checkbox"/> BEA conducted _____, 200__, submitted _____, 200__	
If BEA petition submitted, did MDEQ issue favorable determination of adequacy? Date of determination letter, if any: _____, 200__.	

- ☐ Owner or operator prior to June 5, 1995
☐ Other reason (briefly describe: _____)

C. Other Governing Authorities

Please check all that apply:

- ☐ Administrative Order on Consent ☐ Unilateral Order
☐ Consent Decree ☐ Other Agreement(s) (Describe: _____)
☐ Part 111 ☐ Part 213
☐ Part 31 ☐ CWA
☐ Other Statute(s) (Describe: _____)

Please describe any enforcement actions and/or other involvement by agencies other than the MDEQ (e.g. EPA, county health department):

E. Economic Incentives

- Is this Site part of an approved brownfield plan? ☐ Yes ☐ No
Is it anticipated that the Site will be part of a brownfield plan? ☐ Yes ☐ No
If either of the above is answered "yes," please list the anticipated incentives under the brownfield plan:
Will brownfield incentives benefit a liable party? ☐ Yes ☐ No
Please list other applicable, anticipated economic incentives:
Other incentives, such as grants or loans:

F. Currently Known or Suspected Environmental Conditions or Source of Releases

- Please describe what Site investigation has been performed to date:
Please list all known hazardous substances known or suspected to be released:
Please list date(s) of release(s):
Sources, please check all that are currently expected to apply and describe (condition #1):
☐ USTs -
☐ ASTs -
☐ Other containers -
☐ Free product -
☐ Free phase liquids; Csat soils, Non-aqueous phase liquids-
☐ Soil "hot spot" -

- ☐ Groundwater “hot spot” -
- ☐ Contaminated sediment -
- ☐ Other -

Risks, please check all that are currently expected to apply:

Groundwater:

Soil:

- | | |
|--|--|
| <input type="checkbox"/> Drinking water (condition #2) | <input type="checkbox"/> Dermal exposure (condition #6) |
| <input type="checkbox"/> Dermal exposure (condition #3) | <input type="checkbox"/> Ambient air (condition #7) |
| <input type="checkbox"/> Indoor air (condition #4) | <input type="checkbox"/> Indoor air (condition #8) |
| <input type="checkbox"/> Surface water (condition #5) | <input type="checkbox"/> Leaching to Drinking water (condition #9) |
| <input type="checkbox"/> Leaching to Groundwater with Dermal Contact (condition #10) | |
| <input type="checkbox"/> Leaching to Groundwater then to Surface water (condition #11) | |
| <input type="checkbox"/> Direct transport Surface water (condition #12) | |
| <input type="checkbox"/> Contaminated Sediment use impairments (condition #13) | |

Describe

Other Risks:

- ☐ Acute toxic impacts (Condition #14) Describe:
- ☐ Physical hazards (Condition #14) Describe:
- ☐ Ecological (Condition #15) Describe:
- ☐ Aesthetics (Condition #15) Describe:

G. Proposed Closure Category

Goal: ☐ Due Care Compliance ☐ Interim Response

☐ Interim Response Designed to Meet Criteria, describe proposed area or media _____

☐ Generic closure ☐ Limited closure ☐ Site-specific closure ☐ No closure

If Limited, describe proposed type of limitation: _____

Land Use Cleanup Category: ☐ Residential ☐ Commercial ☐ Industrial

If commercial, please check which type: ☐ I ☐ II ☐ III ☐ IV

Submitted by: _____

Date: _____

Reviewed by: _____

Date: _____

Review Comments:

PART 201 PROJECT CHECKLIST

PART II: ADEQUACY OF SITE OR FACILITY CHARACTERIZATION CHECKLIST

Site or Facility Name: _____

For each item identify where the information is presented (e.g., section & page of Phase II investigation)

A. GENERAL CHARACTERISTICS

- | | |
|--|--|
| Not applicable
Adequate Inadequate
Unable to determine | 1. Describe physical location, including property descriptions and scaled map. |
| Not applicable
Adequate Inadequate
Unable to determine | 2. Identify the hazardous substances used, released or discovered. Include all hazardous substances, all release locations and date(s) of discovery or release. Identify the type of release including the point of release (e.g., AST, UST, other containers, pit, pond or lagoon, spillage), quantity released and the time frame of the release, such as a one-time catastrophic release or release occurring over a period of hours, days, weeks or years. Include scaled map. |
| Not applicable
Adequate Inadequate
Unable to determine | 3. Describe past and current land use. If cleanup will be based on future land use, describe the intended land use. |
| Not applicable
Adequate Inadequate
Unable to determine | 4. Identify the property zoning for all affected properties. |
| Not applicable
Adequate Inadequate
Unable to determine | 5. On a scaled map locate all buildings and include a description of each building's construction details or provide as-built plans, areas of pavement and non-paved areas. |
| Not applicable
Adequate Inadequate
Unable to determine | 6. Identify on a scaled map all subsurface utilities (include storm sewers, sanitary sewers, power, pipelines, communication, water, etc.) and each utility corridor. |
| Not applicable
Adequate Inadequate
Unable to determine | 7. Identify all transportation corridors on scaled map. |
| Not applicable
Adequate Inadequate
Unable to determine | 8. Identify the location all of individual water supply wells, community wells and municipal wells on a scaled map. |
| Not applicable
Adequate Inadequate
Unable to determine | 9. Identify how the community the site/facility is located in obtains their drinking water. |
| Not applicable
Adequate Inadequate
Unable to determine | 10. Identify if site/facility is in a wellhead protection zone, include information on scaled map. |

B. GENERAL SOIL, GROUNDWATER AND SURFACE WATER CONDITIONS

- | | |
|--|---|
| Not applicable
Adequate Inadequate
Unable to determine | 1. Describe surface soil type or types (include soil classification) and surface water runoff features. |
| Not applicable
Adequate Inadequate
Unable to determine | 2. If metals have been released, consider determining background metal concentrations in native soil. If lead is a concern, determine fine fraction from coarse fraction. |
| Not applicable
Adequate Inadequate
Unable to determine | 3. Describe subsurface geology, soil types and their classification and depth to groundwater. |
| Not applicable
Adequate Inadequate
Unable to determine | 4. If groundwater is not in an aquifer, describe the basis for this determination. |

Not applicable	5. Describe groundwater flow direction, locally and regionally.
Adequate Inadequate	
Unable to determine	
Not applicable	6. Determine hydraulic connection between groundwater and surface water bodies, including utility corridors and their piping.
Adequate Inadequate	
Unable to determine	
Not applicable	7. Identify all local and regional surface water bodies (including wetlands, drains, or streams) on a scaled map and describe their use (e.g., recreational beach, farm pond, irrigation pond, disposal lagoon, coastal wetland, etc.).
Adequate Inadequate	
Unable to determine	
Not applicable	8. Identify the potential for surface water sediments to be contaminated.
Adequate Inadequate	
Unable to determine	

The three dimensional extent of all hazardous substances released into soil and groundwater must be sufficiently characterized in order to enable the comparison to the generic residential criteria using Part III, and the appropriate risk based criteria for the land-used based criteria or site specific criteria anticipated for the remedy.

C. HAZARDOUS SUBSTANCES IN THE GROUNDWATER

Not applicable	Present as free product (LNAPL or DNALP) in the groundwater (condition #1)
Adequate Inadequate	
Unable to determine	
Not applicable	Risk to drinking water usage (condition #2)
Adequate Inadequate	
Unable to determine	
Not applicable	Risk from dermal contact (condition #3)
Adequate Inadequate	
Unable to determine	
Not applicable	Risk from volatilization to indoor air (condition #4)
Adequate Inadequate	
Unable to determine	
Not applicable	Risk from groundwater venting to surface waters (condition #5) Evaluate indirect venting to surface waters through storm sewer, utility corridor, other referential pathway
Adequate Inadequate	
Unable to determine	
Not applicable	Hazardous substances in groundwater present acute hazards (condition #14)
Adequate Inadequate	
Unable to determine	
Not applicable	Hazardous substances in groundwater present ecological risk or cause an aesthetic impact (condition #15)
Adequate Inadequate	
Unable to determine	

D. HAZARDOUS SUBSTANCES IN THE SOIL

Not applicable	Present in soil in as free phase contaminants, exceed CSAT criteria (condition #1)
Adequate Inadequate	
Unable to determine	
Not applicable	Risk from direct contact (condition #6)
Adequate Inadequate	If metals, evaluate background metals concentrations
Unable to determine	Evaluate whether at the soil surface or at depth
Not applicable	Risk from inhalation of substances emitted to or dispersed in ambient air (condition #7)
Adequate Inadequate	Evaluate whether at the soil surface or at depth
Unable to determine	
Not applicable	Risk from volatilization to indoor air (condition #8)
Adequate Inadequate	
Unable to determine	

Not applicable	Risk from soils leaching to drinking water (condition #9)
Adequate Inadequate	
Unable to determine	
Not applicable	Risk from soils leaching to groundwater and dermal contact with
Adequate Inadequate	groundwater (condition # 10)
Unable to determine	
Not applicable	Risk from soils leaching to groundwater and then venting to surface waters
Adequate Inadequate	(condition #11)
Unable to determine	
Not applicable	Potential for leaching to groundwater evaluated (conditions #9, 10, &11)
Adequate Inadequate	
Unable to determine	
Not applicable	Risk from contaminated soil runoff to surface waters (condition #12)
Adequate Inadequate	
Unable to determine	
Not applicable	Hazardous substances in soil present acute hazards (condition #14)
Adequate Inadequate	
Unable to determine	
Not applicable	Hazardous substances present ecological risk or cause an aesthetic impact
Adequate Inadequate	(condition #15)
Unable to determine	

E. HAZARDOUS SUBSTANCES IN SURFACE WATER SEDIMENTS

Not applicable	Determine if use is impaired. (condition #13)
Adequate Inadequate	Evaluate potential for leaching from sediments to surface water or to
Unable to determine	groundwater if sediments are to be relocated to upland location.

F. OTHER INJURY THAT REQUIRES CONSIDERATION

Not applicable	Determine if other injury that requires consideration exists that is not
Adequate	accounted for in the development of generic criteria, such as physical hazard,
Inadequate	phototoxicity, flora/fauna/food chain contamination.
Unable to determine	

Submitted/Completed by: _____ **Date:** _____

Review/Determination by: _____ **Date:** _____

Review Comments: (Identify any disagreement with submitter's evaluation)

PART 201 PROJECT CHECKLIST

PART III: PRELIMINARY PATHWAY AND CRITERIA EVALUATION

Site or Facility Name: _____

Relevant Pathway Evaluation

- | | |
|---|--|
| <input type="checkbox"/> Groundwater not in an aquifer; and not reasonably expected to transport contaminants to an aquifer | Drinking water usage (condition #2) and soil protective for drinking water (condition #9) not relevant |
| <input type="checkbox"/> Groundwater not reasonably expected to vent to surface waters above generic criteria | Venting to surface water (condition #4) and soil protective for venting to surface water (condition #9) not relevant |
| <input type="checkbox"/> All contaminants of concern not likely to volatilize | Groundwater volatilization to indoor air (condition #4) and soil volatilization to indoor |

Source Evaluation:

- | | |
|---|---------------|
| 1. Abandoned substances that are being dispersed or may be dispersed in the future. | |
| a. Containerized hazardous substances present. | Action Needed |
| Not relevant* | |
| 1. Describe type, size and number of containers. | |
| 2. Describe hazardous substances in containers. | |
| 3. Identify location of containers using a scaled map. | |
| b. <i>FREE PHASE LIQUIDS</i> or <i>FREE PRODUCT</i> present. | Action Needed |
| c. Csat soils present. | Not relevant |
| d. Other sources (soils/gw "hot spots," etc.) present; | Action Needed |
| 1. Describe type | Not relevant |
| e. Part 201 sources related to post June 5, 1995 releases present. | Action Needed |
| | Not relevant |

Risks due to Groundwater Contamination:

- | | | |
|--|-----------------|---------------|
| 2. Drinking water usage | Within criteria | Action Needed |
| Not relevant | | |
| 3. Dermal contact (such as by utility workers) | Within criteria | Action Needed |
| | Not relevant | |
| 4. Volatilization to indoor air | Within criteria | Action Needed |
| | Not relevant | |
| 5. Venting to surface waters | Within criteria | Action Needed |
| | Not relevant | |

Risks due to Soil Contamination:

- | | | |
|--|-----------------|---------------|
| 6. Direct contact (ingestion, dermal) | Within criteria | Action Needed |
| 7. Inhalation of substances emitted to or dispersed in ambient air | Within criteria | Action Needed |
| | Not relevant | |

8. Volatilization to Indoor air	Within criteria Not relevant	Action Needed
9. Leaching to drinking water	Within criteria Not relevant	Action Needed
10. Leaching to GW and then dermal contact	Within criteria Not relevant	Action Needed
11. Leaching to GW and then venting SW	Within criteria Not relevant	Action Needed

Risks to surface water and surface water sediments contamination (Rule 730):

Sediment use impairments (condition #13)	Action Needed	Not relevant
--	---------------	--------------

Other injury that requires consideration (Rule 728):

Existing or potential for pollutant soil runoff to surface water (condition #12)	Action Needed	Not relevant
Acute toxic impacts (condition #14)	Action Needed	Not relevant
Physical hazards (condition #14)		
Phototoxicity (condition #14)	Action Needed	Not relevant
Ecological concerns (flora/fauna/food chain contamination) (condition # 15)	Action Needed	Not relevant
Aesthetic conditions (condition #15)	Action Needed	Not relevant
Other hazard not accounted for in Generic Criteria (condition #14)	Action Needed	Not relevant

*** For a Due Care determination Not Relevant indicates Not Required**

Submitted/Completed by: _____

Date: _____

Review/Concurrence by: _____

Date: _____

Review Comments (Identify any disagreement with submitter's evaluation)

PART 201 PROJECT CHECKLIST**PART IV: PRELIMINARY PROPOSALS FOR CONDITIONS WHERE ACTION NEEDED**

Site or Facility Name: _____

Condition #1 Source Control
Actions proposed: -
Actions reported in Source Control evaluation: -
MDEQ review comments: Concurrency
Condition #2 Risk to Drinking Water from Groundwater Contamination
<input type="checkbox"/> check if determined action not necessary in Part III
Response Activities proposed: -
Response Activities completed: -
MDEQ review comments: Concurrency
Condition #3 Risk from Dermal Contact with Groundwater Contamination
<input type="checkbox"/> check if determined action not necessary in Part III
Response Activities proposed: -
Response Activities completed: -
MDEQ review comments: Concurrency
Condition #4 Risk from Volatilization of Groundwater Contamination to Indoor Air
<input type="checkbox"/> check if determined action not necessary in Part III
Response Activities proposed: -
Response Activities completed: -
MDEQ review comments: Concurrency
Condition #5 Risk from Groundwater Contamination Venting to Surface Waters
<input type="checkbox"/> check if determined action not necessary in Part III
Response Activities proposed: -
Response Activities completed: -
MDEQ review comments: Concurrency
Condition #6 Risk from Direct Contact with Soil Contamination
<input type="checkbox"/> check if determined action not necessary in Part III
Response Activities proposed: -
Response Activities completed: -
MDEQ review comments: Concurrency

Condition # 7 Risk from Inhalation of Substances Emitted to or Dispersed in Ambient Air	
<input type="checkbox"/> check if determined action not necessary in Part III	
Response Activities proposed:	
-	
Response Activities completed:	
-	
MDEQ review comments:	Concurrence
Condition # 8 Risk from Soil Contamination Volatilization to Indoor Air	
<input type="checkbox"/> check if determined action not necessary in Part III	
Response Activities proposed:	
-	
Response Activities completed:	
-	
MDEQ review comments:	Concurrence
Condition # 9 Risk from Soil Contamination Leaching to Drinking Water	
<input type="checkbox"/> check if determined action not necessary in Part III	
Response Activities proposed:	
-	
Response Activities completed:	
-	
MDEQ review comments:	Concurrence
Condition # 10 Risk from Soil Contamination Leaching to Groundwater and Dermal Contact	
<input type="checkbox"/> check if determined action not necessary in Part III	
Response Activities proposed:	
-	
Response Activities completed:	
-	
MDEQ review comments:	Concurrence
Condition # 11 Risk from Soil Contamination Leaching to Groundwater and then venting to Surface Waters⁷	
<input type="checkbox"/> check if determined action not necessary in Part III	
Response Activities proposed:	
-	
Response Activities completed:	
-	
MDEQ review comments:	Concurrence
Condition #12 Direct Transport of Contaminated Soils to Surface Waters	
<input type="checkbox"/> check if determined action not necessary in Part III	
Response Activities proposed:	
-	
Response Activities completed:	
-	
MDEQ review comments:	Concurrence

Condition # 13 Risk from Contamination to Surface Water Sediments	
<input type="checkbox"/> check if determined action not necessary in Part III	
Response Activities proposed:	
-	
Response Activities completed:	
-	
MDEQ review comments:	Concurrence
Condition # 14 Acute Toxic Impacts; Physical Hazards; or Other Hazards Not Accounted for in Generic Criteria	
<input type="checkbox"/> check if determined action not necessary in Part III	
Response Activities proposed:	
-	
Response Activities completed:	
-	
MDEQ review comments:	Concurrence
Condition # 15 Ecological or Aesthetic Impacts	
<input type="checkbox"/> check if determined action not necessary in Part III	
Response Activities proposed:	
-	
Response Activities completed:	
-	
MDEQ review comments:	Concurrence

Completed by: _____ Date: _____

Completed for MDEQ by: _____
Date: _____

DETROIT.2516212.1

Appendix I:

Project 201 Project Checklist Instructions

The Part 201³ project checklist has been developed as a tool to encourage the efficient and timely evaluation and implementation of response activities. The checklist is intended to assist in documenting status, guiding progress, and helping to determine the necessary response activities at sites of environmental contamination.

The checklist should be used by a party who intends to propose response activities to facilitate discussions with Michigan Department of Environmental Quality, Remediation and Redevelopment Division (RRD) staff. An initial “scoping” discussion for a site normally is intended to provide an understanding of what options are available to address owner or operator needs, as well as compliance with Part 201 obligations including due care and remedial obligations as appropriate. A discussion of available data, data needs, establishing objectives for response activities and prioritizing objectives (e.g., source control, or protecting nearby drinking water wells) with RRD staff can assist in focusing decision making to result in more timely and effective cleanups. This scoping meeting should also be used as an opportunity for both RRD staff and the regulated party to identify high priority interests regarding the site.

The checklist includes four parts which provide a sequential process to assure necessary consideration of available data, data needs, and necessary pathway evaluations to comply with Part 201 requirements. The checklist facilitates documentation of decisions regarding determinations of site characterization, the relevancy of pathways, and the applicability of criteria. The checklist uses terms consistent with existing Part 201 guidance documents, including the Cleanup Criteria Training Materials⁴. The checklists may be used concurrently or sequentially as information is gathered.

PART I SITE INTAKE FORM

This part should be completed by a party who intends to propose to conduct response activities to facilitate a scoping discussion for the site with RRD staff. This portion of the checklist provides information on the site location, party proposing response activities, currently known or suspected environmental conditions or sources of releases, and currently anticipated objective of the response activities. The data to complete this portion of the checklist may be obtained from an owner or operator’s due diligence activities, including an environmental assessment of the property⁵, or may be obtained from remedial investigations or other sources.

³ Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act 1994 PA 451, as amended

⁴ See www.michigan.gov/deqrrd Part 201 Cleanup Criteria & Part 213 Risk-Based Screening Levels Training Materials

⁵ See www.michigan.gov/deqrrd Part 201 Citizen’s Guides for BEA and Due Care

PART II ADEQUACY OF SITE CHARACTERIZATION CHECKLIST

This part provides a detailed list of characterization efforts that may be necessary depending on site conditions and the releases associated with the site. Part II may be discussed as part of an initial RRD scoping discussion with a focus on determining the type of remedial investigation necessary for site conditions, and potential site priorities. Part II may also serve as documentation of the RRD review of sufficiency of site data collected for pathway evaluation.

PART III PRELIMINARY PATHWAY AND CRITERIA EVALUATION

This part provides by pathway, risk or condition a determination of whether the pathway is relevant, and whether applicable criteria are exceeded and may pose the need for response action. Part III may also be discussed as part of an initial RRD scoping discussion with a focus on determining whether there are sufficient data to determine a pathway or condition is not relevant. Part III also may serve as documentation of RRD's review and concurrence of the relevance of pathway, risks, or conditions.

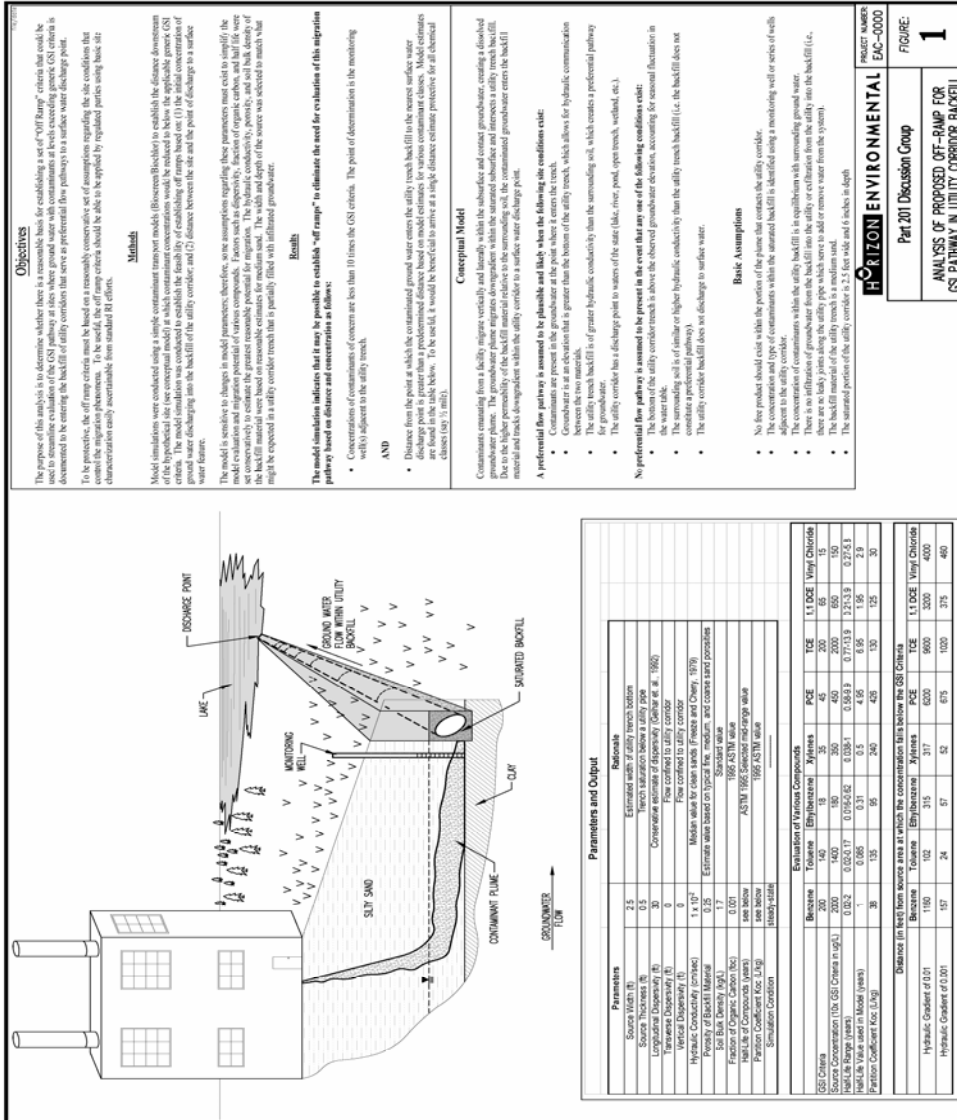
PART IV PRELIMINARY PROPOSALS FOR CONDITIONS WHERE ACTION IS NEEDED

This part provides a summary of the actions proposed to address conditions or pathways which require response activities.

The checklists can be updated throughout the life of a project and should be signed and dated by the party(s) completing the form to assure clarity regarding whether the determinations are made by the RRD rather than only suggested by the party proposing the response activities.

Appendix J:

Part 201 Discussion Group Analysis of Proposed Off-Ramp for GSI Pathway



Appendix K:

*Potential Program Benefits of Permit Approach*⁶

LIABILITY COMMITTEE

Issue	Discussion
Baseline Environmental Assessment (BEA)/due care process	A permit replaces “BEA” for liability protection, and specifies in an enforceable way, with notice, the continuing due care obligations.
Notice of brownfield activities to liable parties	Permits would be subject to general notice provisions as are other permits. Specific notice to Liable Parties, if known, can and should be required at the time a use/occupancy permit is obtained.
Notice of institutional controls	A permit would provide the notice and organic provisions that a permittee must comply with. This would provide notice and ongoing compliance duty.
Intervening nonliable owners	Would not have to obtain a permit once it transacted the property. No continuing obligation, since those would be shared between the current permit holder and liable parties (if any).
Continued review of BEA by MDEQ	The MDEQ would have a role in any permit, and a permit replaces the BEA. A “general permit” may have less site-specific review.
Disclosure to MDEQ during transaction	There would be no more undisclosed sites. Any site that needs a permit would be in the permit system, and can be identified during a transaction screen.
Liable party v. brownfield and state-owned sites cleanup standards	Remediation permit (RP) would contain more requirements than a use/occupancy permit (UOP). Nonliable parties can elect to get an RP, but it would not be required. UOP is due care, not remediation.
Are due care obligations appropriately defined?	A shift to a permit paradigm allows for a change in the way due care is defined, but the topic of what is appropriate “due care” still needs to be nailed down.
Long-term performance of due care	Permit provides for specific and continuous method for assuring due care is identified and that the right person knows what he or she must do. These obligations will continue through subsequent permits.
How to handle previous determinations	Can be converted to UOP permit.
Section 14 duties	If a new site is created or discovered, the permit obligation for an RP commences. If a permit is obtained, the conditions in the permit can address each of the affirmative obligations in Section 14.
Compliance—use of fines and penalties	Enforcement of the obligation to obtain a permit and then for failure to meet permit obligations is more straightforward. Can and should incorporate fines and penalties to secure compliance. Focus is on liable parties to do the work rather than on cost recovery.
Compliance—site identification	Permit requirement for all sites of contamination plus existing transaction screen process will provide notice to the MDEQ of all sites subject to permit.
Compliance—reduction in time and resources needed to identify liable party	Permit requirement changes complicated cost recovery action into something simpler, does not require expenditure of resources to recover costs. Permit system can include ability of any person to enforce (like under Clean Water Act or Clean Air Act).
Compliance—reporting/disclosure	Permit system includes reporting obligations. By setting objectives and criteria, permit requirements can be somewhat self-implementing.

⁶ Document prepared for the Part 201 Liability Subgroup discussion by Alan D. Wasserman, October 2006, and edited by Public Sector Consultants.

Issue	Discussion
Compliance—Use of CERCLA	Not addressed by permit paradigm.
Compliance—what is “diligently pursue”	Permit specifies requirements and time frames. Removes ambiguity.
Finality—Need to assure continuous response is balanced with finality	Permit becomes the “finality” endpoint. Once you have a permit, not subject to fines and penalties as long as in compliance. Ongoing response activities are covered by permit. On-going permit requirement can be terminated upon “completion” of response activities. Long-term controls (barriers, use restrictions) will be carried in future permits.
Finality—Liability release for completed cleanups	The permit requirement terminates when the criteria identified have been met. On-going maintenance/use restrictions would be the obligation of the current owners/operators. Does this help solve the problem?
Balance of risk-sharing between regulated parties and the public	Permit model protects the public through response activities and due care. Liable party must complete and maintain response activity. Users have to have a permit that establishes due care. The public is protected against residual risk.
Eliminate RAP?	Remediation permit replaces RAP.

BROWNFIELD COMMITTEE

Issue	Discussion
Partnerships	Unclear if permit process offers opportunity to improve interagency coordination.
Unified application format	A permit system simplifies <i>some</i> of the problems, but only as they relate to the elements that must be met to obtain a permit. However, a permit application and or permit can have some use in standardizing environmental information transmitted to various agencies.
Response time	Permit system can (if done correctly) reduce the time it takes for development of a document regarding environmental compliance issues. Simple environmental projects can qualify for general permits.
Staff training	Permit system will probably complicate staff training.
MDEQ facilitators	None
Eligible activities	Permit system can allow permit conditions to specify brownfield eligible activities on a site-specific basis, thus allowing more flexibility if desired. What is eligible can be defined in the permit as well (or instead of) by statute.
Work plans	UOP or RP would replace need for work plan. Use of general permits can eliminate logjams. Permits would encompass all requirements in one document, and would not be piecemeal.

COMPLEXITY

Issue	Discussion
Number of cleanup criteria and exposure pathways	Issue not directly addressed; however, permit conditions can be used as “off-ramps” so that specific criteria would not apply provided that condition is maintained. For example, no foundations or ordinary construction vapor barriers may remove indoor air pathway from permit.
Probabilistic risk assessment (PRA)	Issue not directly addressed; however, conditions used to do a PRA can be reflected in permit conditions.
GSI pathway	Not addressed.
ARARs	Not addressed.
Improvement of use of air criteria	A permit might be used to establish use conditions that obviate the need for the permittee to assess or address these criteria.
Goal of regulation and	Use of rules and guidance could follow formulas used in other permit

Issue	Discussion
guidance	programs (this does not necessarily solve the complexity problem).

PROGRAM ADMINISTRATION

Issue	Discussion
Make relation between parties more of a partnership	Permit paradigm changes the relationship two applicant/permit writer. This may or may not solve or improve this issue, but it changes things.
Balance between regulatory and service functions	Permit paradigm, with different types of permits, actually unifies the role of MDEQ. Service and regulation is provided through the same product. However, different types of products can allow for distinctions between the customers.
Reinforce distinction between liable and nonliable parties	Permit distinctions can clearly delineate between what is expected of liable parties and others. The paradigm actually proposes that a liable party must get an RP. Other permits available for other types of customers.
Project scoping meetings	For site-specific permits, communications with the applicant can be made part of the process. This is done in other permit programs. Also, draft permit stage allows for applicant input (and public input).

Appendix L:

Bona Fide Prospective Purchaser under CERCLA

The bona fide prospective purchaser provision provides, in pertinent part:

NO AFFILIATION—The person is not—(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through—(I) any direct or indirect familial relationship; or (II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or (ii) the result of a reorganization of a business entity that was potentially liable. CERCLA § 101(40)(H).

Appendix M:

Section 14(1)(g) Diligent Pursuit

A sub-work group of the Liability/Compliance Subgroup was tasked to come up with some definition for the term *diligently pursue* as used in Section 14(1)(g) of Part 201. This section requires a liable owner or operator of property that he or she has knowledge is a facility to, among other things, “diligently pursue” response activities necessary to achieve the Part 201 cleanup criteria. The term *diligently pursue* is not specific as to what a covered person needs to do to comply.

After discussion of several background issues, and with reference to the underground tank program, the group decided to define “diligently pursue” in terms of time frames and deliverables to the MDEQ. Compliance with the diligently pursue requirement would be determined by timely submittal of a deliverable. The substance of the deliverable would be subject to other statutory and regulatory requirements for adequacy and sufficiency, but the group decided that those requirements should be addressed independently of the diligently pursue requirement, except as provided below.

In order for an owner or operator to demonstrate that he or she has met the requirements of Section 14(1)(g), that owner/operator must do the following:

- Within 45 days of discovery of a release, submit an interim response report. This report should document all of the activities undertaken by the owner or operator to meet the requirements of Section 14(1)(b) (reporting, if required), 14(1)(c) (stopping release at the source), 14(1)(d) (immediate implementation of source control or removal measures if practical), 14(1)(e) (elimination of any threat of fire or explosion), and 14(1)(f) (removal of liquid phase hazardous substances). It is understood that all of the activities may not be completed at this time, but the report should document what has been done to date, and a schedule for completion of the final elements. Actions taken are subject to a rule of reasonableness. The main purpose of this description is to provide the owner or operator with a deliverable that allows documentation of the actions taken.
- Within one year of discovery of a release, submit an investigation report and work plan for response activities. A basic investigation should be completed by this time that is sufficient to allow a covered person to propose additional response activities. If the report proposes additional investigation to identify nature and extent, a final investigation report will be due in six months. The report should include any interim response actions taken during the year, and a work plan for any additional response actions needed, including the submission of a remedial action plan (RAP). If the work plan calls for interim responses, the work plan should provide that a RAP would be submitted within a year of implementation of the interim responses, or a schedule that will be followed that culminates in the submittal of a RAP.

Remaining Issues

Other opportunities to clarify Section 14, include, for example,

- the need to better identify when an owner or operator has “knowledge” that the property is a facility, and
- whether the “reporting requirement” should be made more meaningful.

